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N. 2942

No. 14798

United States
Court of Appeals
for the Ninth Circuit

JAMES TAYLOR YOKELY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILE

DEC 27 1955

PAUL P. WINGEN, CLERK

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For the Appellee.

In the District Court for the Territory of Alaska,
Third Division
Criminal No. 3122

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JAMES TAYLOR YOKELY and LENA MAE
WILKINS,
Defendants.

INDICTMENT
Section 371, Title 18 U.S.C.A.

The Grand Jury charges:

Count I.

That on or about the 8th day of April, 1954, at or near Anchorage, Third Judicial Division, Territory of Alaska, James Taylor Yokely and Lena Mae Wilkins did unlawfully and feloniously conspire with one another and together to violate a law of the United States, to wit: Section 2422, Title 18, U.S.C.A., namely, transportation within a possession of the United States a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery. The said James Taylor Yokely and Lena Mae Wilkins did agree and plan with one another that the said Lena Mae Wilkins would travel from Anchorage to Fairbanks, Alaska, via Alaska Airlines, with the intent and purpose that the said Lena Mae Wilkins engage in prostitution and debauchery in Fairbanks Alaska.

The following overt acts being committed by the said James Taylor Yokely and Lena Mae Wilkins to effect the object of the conspiracy:

(1) The said James Taylor Yokely did give Thirty-three Dollars (\$33.00) to the said Lena Mae Wilkins to purchase a ticket from Alaska Airlines in order that the said Lena Mae Wilkins travel from Anchorage to Fairbanks, Alaska, for purposes of prostitution at Fairbanks, Alaska.

(2) The said James Taylor Yokely did drive the said Lena Mae Wilkins to the Anchorage International Airport in order that she might board the Alaska Airlines plane to Fairbanks, Alaska, on or about the 9th day of April, 1954.

(3) The said Lena Mae Wilkins did on or about the 9th day of April, 1954, travel to Fairbanks from Anchorage, Alaska, via Alaska Airlines.

Count II.

That on about the 13th day of April, 1954, at Fairbanks, Fourth Judicial Division, Territory of Alaska, James Taylor Yokely and Lena Mae Wilkins did conspire with one another and together to violate a law of the United States, to wit: Section 2422, Title 18, U.S.C.A., namely, transportation within a possession of the United States a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery. The said James Taylor Yokely and Lena Mae Wilkins did conspire with one another and together that the said Lena Mae Wilkins should travel from Fair-

banks, Alaska, to Kodiak, Third Judicial Division, Territory of Alaska, on the lines of interstate carriers, to wit: Alaska Airlines and Pacific Northern Airlines, with the intent and purpose that the said Lena Mae Wilkins engage in prostitution and debauchery in Kodiak, Alaska.

The following overt acts being committed to effect the object of the conspiracy:

(1) The said James Taylor Yokely did give Seventy-five Dollars (\$75.00) to the said Lena Mae Wilkins to purchase a ticket on Alaska Airlines to Anchorage, Alaska, and a ticket from Anchorage, Alaska, to Kodiak, Alaska, via Pacific Northern Airlines.

(2) That on or about the 13th day of April, 1954, the said Lena Mae Wilkins did travel via said Alaska Airlines from Fairbanks to Anchorage, Alaska, and on the following day the said Lena Mae Wilkins did travel from Anchorage to Kodiak, Alaska, via Pacific Northern Airlines.

A True Bill.

/s/ V. E. SCHAWENGERDT,
Foreman.

/s/ WILLIAM PLUMMER,
United States Attorney.

Witnesses examined before the grand jury:

Gordon W. Hartlieb

Lena Mae Wilkins

Harold Duke

[Endorsed]: Filed November 18, 1954.

[Title of District Court and Cause.]

PLEA OF NOT GUILTY

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now on this 3rd day of December, 1954, came L. W. Kirkland, Assistant United States Attorney, came also the Defendant, James Taylor Yokely, in custody of the United States Marshal, and represented by his counsel, Seaborn J. Buckalew and said defendant having heretofore and on the 1st day of December, 1954, been duly arraigned, announced to the Court that he is ready to enter his plea herein, is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, to wit: Conspiracy, to which defendant says he is not guilty and therefore puts himself upon the Country, and the Assistant United States Attorney, for and in behalf of the Government, does the same, and defendant was remanded to the custody of the United States Marshal.

[Entered]: December 3, 1954.

DEFENDANT'S PROPOSED INSTRUCTION No. 1

The Court instructs you that the out of court statement, Government's Exhibit No. 1, which statement is the statement of Lena Mae Wilkins, a

codefendant, that the facts set out in the statement are not to be considered by you in determining the guilt or innocence of James Taylor Yokely. The facts and circumstances set out in the statement are not competent evidence against James Taylor Yokely and I instruct you to disregard this statement completely in considering and weighing the Government's case against James Taylor Yokely.

Bartlett vs. U. S.,
166 F 2d 920;

Logan vs. U. S.,
144 U. S. 263.

Refused.

[Endorsed]: Filed December 30, 1954.

DEFENDANT'S PROPOSED
INSTRUCTION No. 2

The Court instructs you that testimony contained in the out of court statement, if it be false in any material particular, you are to consider and weigh the balance of the statement in view of the fact that a portion of the said statement is false. If you are convinced that a portion of the out of court statement is false, you are to view with caution the balance of the statement. If the statement is false in one particular, the balance of the statement could just as well be false.

Refused.

[Endorsed]: Filed December 30, 1954.

DEFENDANT'S PROPOSED
INSTRUCTION No. 3

You are further instructed that the proof of overt acts, standing alone, is not sufficient to pass a verdict of guilty. Before you can return a verdict of guilty, you must find that defendants did conspire and plan together to violate the act commonly known as the Mann Act and did, thereafter, execute one or more acts for the purpose of effectuating the prior conspiracy.

Given.

[Endorsed]: Filed December 30, 1954.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors, you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendants in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally

your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you because you are the triers of the facts.

1.

By the indictment in this case the defendants Lena Mae Wilkins and James Taylor Yokely have been charged with the crime of conspiracy to commit an offense against the United States. Count number one of the indictment charges:

“That on or about the 8th day of April, 1954, at or near Anchorage, Third Judicial Division, Territory of Alaska, James Taylor Yokely and Lena Mae Wilkins did unlawfully and feloniously conspire with one another and together to violate a law of the United States, to wit: Section 2422, Title 18, U.S.C.A., namely, transportation within a possession of the United States a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery. The said James Taylor Yokely and Lena Mae Wilkins did agree and plan with one another that the said Lena Mae

Wilkins would travel from Anchorage to Fairbanks, Alaska, via Alaska Airlines, with the intent and purpose that the said Lena Mae Wilkins engage in prostitution and bebauchery in Fairbanks, Alaska.”

In charging and establishing the crime of conspiracy it is necessary that an overt act be alleged and proved. The indictment alleges that the following overt acts were committed by the said defendants to effect the object of the conspiracy:

(1) The said James Taylor Yokely did give Thirty-three Dollars (\$33.00) to the said Lena Mae Wilkins to purchase a ticket from Alaska Airlines in order that the said Lena Mae Wilkins travel from Anchorage to Fairbanks, Alaska, for purposes of prostitution at Fairbanks, Alaska.

(2) The said James Taylor Yokely did drive the said Lena Mae Wilkins to the Anchorage International Airport in order that she might board the Alaska Airlines plane to Fairbanks, Alaska, on or about the 9th day of April, 1954.

(3) The said Lena Mae Wilkins did on or about the 9th day of April, 1954, travel to Fairbanks, from Anchorage, Alaska, via Alaska Airlines.

Count Number Two of the Indictment Charges:

“That on or about the 13th day of April, 1954, at Fairbanks, Fourth Judicial Division, Territory of Alaska, James Taylor Yokely and Lena Mae Wilkins did conspire with one another and together to violate a law of the United States, to wit:

Section 2422, Title 18, U.S.C.A., namely, transportation within a possession of the United States a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery. The said James Taylor Yokely and Lena Mae Wilkins did conspire with one another and together that the said Lena Mae Wilkins should travel from Fairbanks, Alaska, to Kodiak, Third Judicial Division, Territory of Alaska, on the lines of interstate carriers, to wit: Alaska Airlines and Pacific Northern Airlines, with the intent and purpose that the said Lena Mae Wilkins engage in prostitution and debauchery in Kodiak, Alaska.”

The indictment charges that the following overt acts were committed to effect the object of the conspiracy:

(1) The said James Taylor Yokely did give Seventy-five Dollars (\$75.00) to the said Lena Mae Wilkins to purchase a ticket on Alaska Airlines to Anchorage, Alaska, and a ticket from Anchorage, Alaska, to Kodiak, Alaska, via Pacific Northern Airlines.

(2) That on or about the 13th day of April, 1954, the said Lena Mae Wilkins did travel via said Alaska Airlines from Fairbanks, to Anchorage, Alaska, and on the following day the said Lena Mae Wilkins did travel from Anchorage to Kodiak, Alaska, via Pacific Northern Airlines.

2.

The indictment is brought under the law of the United States which reads as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be * * *”

The relevant provisions of the law of the United States referred to in the indictment, the violation of which is charged by the indictment to have been the object and purpose of the conspiracy, read as follows:

“Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be * * *”

3.

This indictment is a mere allegation of the charge against the defendants and is not, in itself, any evi-

dence of guilt, and no juror should permit himself to be influenced against the defendants because of the fact that an indictment has been returned against the defendants.

To this indictment the defendants have pleaded not guilty, which plea is a denial of the charge, and puts in issue every material allegation of the indictment.

It therefore becomes the duty, and it is incumbent upon the Government to prove every material element of the charge contained in the indictment to your satisfaction beyond a reasonable doubt.

The exact date of the commission of the crime charged in the indictment is not material, provided the crime was committed within three years prior to the date of the indictment. It is sufficient if you find the crime so charged was committed on any date within three years prior to the date of the indictment.

The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendants are guilty beyond a reasonable doubt.

This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any per-

son who is in fact guilty or to aid the guilty to escape punishment.

4.

The essential elements which the government must prove to warrant conviction of the defendants of the crime charged in the first count of the indictment are:

First, that on or about the 18th day of April, 1954, at or near Anchorage, Third Judicial Division, Territory of Alaska, the defendants did unlawfully and feloniously enter into a criminal combination, or conspiracy, in effect agreed between themselves that defendant Lena Mae Wilkins would travel from Anchorage to Fairbanks, Alaska, via Alaska Airlines, with intent and purpose that the said Lena Mae Wilkins would engage in prostitution and debauchery in Fairbanks, Alaska; and that thereafter the defendants, in pursuance and furtherance of said unlawful conspiracy, and to effect the objects and purposes thereof, committed one or more of the overt acts charged in count one of the indictment, namely:

(1) The said James Taylor Yokely did give Thirty-three dollars (\$33.00) to the said Lena Mae Wilkins to purchase a ticket from Alaska Airlines in order that the said Lena Mae Wilkins travel from Anchorage to Fairbanks, Alaska, for purposes of prostitution at Fairbanks, Alaska; or,

(2) The said James Taylor Yokely did drive the said Lena Mae Wilkins to the Anchorage International Airport in order that she might board the

Alaska Airlines plane to Fairbanks, Alaska, on or about the 9th day of April, 1954; or

(3) The said Lena Mae Wilkins did on or about the 9th day of April, 1954, travel to Fairbanks from Anchorage, Alaska, via Alaska Airlines.

If the government has proved these essential elements of the crime charged in the first count of the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendants guilty of the crime charged in said count one. But if the government has failed to prove any of these essential elements beyond a reasonable doubt, then defendants should be found not guilty of the crime charged in the first count of the indictment.

The essential elements which the government must prove to warrant conviction of the defendants of the crime charged in the second count of the indictment are:

That on or about the 13th day of April, 1954, at Fairbanks, Fourth Judicial Division, Territory of Alaska, the defendants did unlawfully and feloniously enter into a criminal combination, or conspiracy, in effect agreed between themselves that defendant Lena Mae Wilkins would travel from Fairbanks, Alaska, to Kodiak, Third Judicial Division, Territory of Alaska, on the Alaska Airlines and Pacific Northern Airlines, with the intent and purpose that the said Lena Mae Wilkins engage in prostitution and debauchery in Kodiak, Alaska; and that thereafter the defendants, in pursuance and

furtherance, of the unlawful conspiracy, and to effect the objects and purposes thereof, committed one or both of the overt acts charged in count two of the indictment, namely:

(1) The said James Taylor Yokely did give Seventy-five dollars (\$75.00) to the said Lena Mae Wilkins to purchase a ticket on Alaska Airlines to Anchorage, Alaska, and a ticket from Anchorage, Alaska, to Kodiak, Alaska, via Pacific Northern Airlines; or,

(2) That on or about the 13th day of April, 1954, the said Lena Mae Wilkins did travel via said Alaska Airlines from Fairbanks to Anchorage, Alaska, and on the following day the said Lena Mae Wilkins did travel from Anchorage to Kodiak, Alaska, via Pacific Northern Airlines.

If the government has proved these essential elements of the crime charged in the second count of the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendants guilty of the crime charged in said count two. But if the government has failed to prove any of these essential elements beyond a reasonable doubt, then defendants should be found not guilty of the crime charged in the second count of the indictment.

While the commission of one of the overt acts alleged in each count of the indictment must be proved beyond a reasonable doubt and like proof must be made that at least one of such acts alleged in each count was done in pursuance and furtherance of the alleged conspiracy and to effect the ob-

jects and purposes thereof, it is not necessary to allege or prove that any of the overt acts charged is in itself criminal.

You are further instructed that the proof of overt acts, standing alone, is not sufficient to pass a verdict of guilty. Before you can return a verdict of guilty, you must find that defendants did conspire and plan together to violate the act commonly known as the Mann Act and did, thereafter, execute one or more acts for the purpose of effectuating the prior conspiracy.

5.

Upon offer of the government there has been admitted in evidence a written statement signed by the defendant Wilkins, and given by her to a law enforcement official at her own request. That statement is relied upon in part by the government to establish the guilt of the defendant of the crime charged against her.

All such statements containing admissions against interest made by one charged with crime should be carefully scrutinized and received with caution. That rule applies to this statement. Such a statement, when made voluntarily and deliberately and with knowledge and understanding of its contents, may be considered as evidence against the person making it, the same as any other evidence. But if such a statement is made by one in custody under circumstances showing that she was induced to make the same through fear or intimidation or

under circumstances showing that the statement was not freely and voluntarily made, or that the statement was made under circumstances that indicate lack of understanding on the part of the person making such a statement as to the nature and contents thereof, then the statement must not be considered as evidence against the person making it.

Unless you find beyond reasonable doubt that the written statement so made by the defendant was freely and voluntarily made, that it was not made under any sense of fear or made as the result of any intimidation or coercion, or as the result of any promise, and unless you further find that the defendant thoroughly understood the nature of the statement and the contents thereof, and knew that she was under no obligation of any kind to make it, then you must disregard said written statement and not consider the same as any evidence whatever against the defendant. If you find that the defendant made said statement freely and voluntarily and with understanding of its contents, then you may consider such statement precisely as you would any other evidence coming before you, giving to such statement the weight and value you think just and right.

6.

A conspiracy is a combination between two or more persons, by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal and unlawful, by criminal and unlawful means. In this case the conspiracy charged in

the indictment is a conspiracy to accomplish a criminal and unlawful purpose.

The word “wilfully” means purposely and intentionally and after some degree of deliberation.

The word “feloniously” means with criminal intent and evil purpose.

An “overt act” is some act which is done to effect the object of the conspiracy as charged in the indictment.

7.

A formal written or oral agreement between the defendants is not essential to the formation of a conspiracy to commit the offense charged in the indictment. The conspiracy need not be established by direct evidence of an unlawful agreement but its existence may be shown, in whole or in part, by proof of facts and circumstances, from which the only logical inference is that what was done by the alleged conspirators as shown by the evidence was and must have been done in furtherance of a common purpose or design of the alleged conspirators to commit an offense against the United States as charged. A conspiracy may be continuous and contemplate the commission of several offenses.

But in order to commit the crime of conspiracy charged, it is necessary that the defendants must have agreed to do an unlawful or criminal thing, and that means that the minds of the parties must have met. If there was no meeting of the minds, there was no agreement and, therefore, no resulting conspiracy.

8.

Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendants intended to commit the offense against the United States charged in the indictment.

In this connection you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts. One who voluntarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result.

9.

The written statement, in the nature of admissions or confessions, made by the defendant Lena Mae Wilkins and admitted in evidence, is to be considered by you with all of the other evidence in the case. The truth or falsity of such statement, or any part thereof, is for your determination. You should consider the same in connection with all other facts and circumstances appearing at the trial, including the circumstances under which the statement was made, and give to the statement such weight as you think just and right.

10.

In any criminal case, an accomplice is one who knowingly and voluntarily and in common interest

with the defendant on trial participates in the commission of the crime charged. The testimony of an accomplice ought to be viewed with distrust. A conviction cannot be had upon the testimony of an accomplice, or any number of accomplices, unless he, or they, be corroborated by such other evidence as tends to connect the defendant with the commission of the crime charged, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission thereof.

11.

Some of the evidence in this case is of the type called "circumstantial." Circumstantial evidence is of the kind in which proof is given in a certain case of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to the common experience of mankind. Circumstantial evidence is the inference of a fact in issue which follows as a natural consequence according to reason and common experience from known collateral facts.

There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence.

While circumstantial evidence under appropriate conditions is just as reliable as direct evidence, and while no greater degree of mental conviction is required to find a verdict on circumstantial evidence than on direct evidence, before you are justified in

convicting the defendants upon circumstantial evidence alone, you must be satisfied beyond a reasonable doubt that all of the facts and circumstances taken together as proved, are not only consistent with the inference that the defendants are guilty, but are at the same time inconsistent with any reasonable hypothesis of the defendants' innocence, or with any other rational hypothesis, for mere suspicions, probabilities or suppositions do not warrant a conviction.

All of the evidence in this case, both direct and circumstantial, should be weighed and considered together and as a whole, and if, as a result thereof, you are convinced beyond a reasonable doubt that the defendants are guilty as charged in the indictment, you should return a verdict accordingly; if not, you should acquit.

12.

In this case, two defendants have been jointly indicted for the alleged crime of conspiracy. You are instructed that no acts or admissions of either of the defendants done or made out of the presence of the other after the termination of the alleged conspiracy, may be considered by you in determining the guilt or innocence of the other. It is for you to decide from all of the evidence the date of the termination of the alleged conspiracy.

13.

A reasonable doubt is a doubt which is reasonable in view of all of the evidence, and such as arises

upon an impartial comparison and consideration of all of it, or from lack of evidence, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.

The very use of the word "reasonable" in the term "reasonable doubt" indicates that by a reasonable doubt is not meant any vague, formless, or imaginary doubt or conjecture which may come into your minds, or which may be created out of sympathy for the accused or another, or out of kindness of heart.

A reasonable doubt must be a substantial doubt, such as an honest, sensible, fairminded person, animated by a conscientious desire to ascertain the truth, may with reason entertain.

If, after examining carefully all the facts and circumstances in the case, in the light of the law as stated by the Court, you have a settled and abiding conviction of the guilt of the defendants, then you are satisfied of guilt beyond a reasonable doubt; but if you do not have such a conviction of the defendant's guilt, then you should acquit.

14.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the

Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

15.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your mind, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party, should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

16.

Under the laws of Alaska, the accused, at his own request and not otherwise, is deemed a competent

witness, the credit to be given to his testimony being left solely to the jury under the instructions of the Court.

In this case the defendant Yokely has offered himself as a witness and has testified in his own behalf. His credibility and the weight of his testimony should be subjected to the same tests as are applied to other witnesses and to their testimony. In weighing the testimony of the defendant you have the right to take into consideration his interest in the result of the trial, as well as all other factors and circumstances by which the credibility of witnesses and the weight of their testimony are rightly judged.

16a.

Under the laws of Alaska, the accused, at his own request and not otherwise, is deemed a competent witness. In this case the defendant, Lena Mae Wilkins, has not offered herself as a witness or testified in her own behalf. You are instructed that no inference of guilt or innocence is to be drawn from her failure to take the stand.

17.

A witness may be impeached by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to this case; or by proof that he

has been convicted of a crime. However, the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

To “impeach” means to bring or throw discredit on; to call in question; to challenge, to impute some fault or defect to. A witness wilfully false in one part of his testimony may be distrusted in other parts. Discrepancies in a witness’ testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

18.

At the close of the trial, counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be,

and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

19.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even

though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendants are guilty.

20.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

21.

When you retire to consider your verdict, you will select one of your number foreman, who will speak for you and date and sign the verdicts unanimously agreed upon. When you so retire you will take with you to the jury room the exhibits, these instructions, and two forms of verdict.

As to defendant Yokely, you will use verdict number one. If you find said defendant guilty of the crime charged in the first count of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph one of that verdict. If you find said defendant Yokely not guilty of the crime charged in the first count of the indictment you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. If you find defendant Yokely guilty of the crime charged in the second count of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph two of that verdict. If you find said defendant not guilty of the crime charged in the second count of the indictment you will insert the word "not" in the blank space before the word "guilty" in said paragraph two.

As to defendant Wilkins, you will use verdict number two. If you find said defendant guilty of the crime charged in the first count of the indictment you will draw a line in the blank space before the word "guilty" in paragraph one of that verdict. If you find the defendant Wilkins not guilty of the crime charged in count one of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. If you find defendant Wilkins guilty of the crime charged in the second count of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph two of said verdict. If you find said

defendant Wilkins not guilty of the crime charged in the second count of the indictment, you will insert the word “not” in the blank space before the word “guilty” in said paragraph two.

It is necessary for you to date, sign, and return into court two forms of verdict, one for each defendant, and also that you make a finding as to each defendant on both counts.

With your verdicts thus unanimously agreed upon, and dated and signed by your foreman, you will return into court the exhibits and these instructions.

Dated at Anchorage, Alaska, this 29th day of December, 1954.

/s/ J. L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed December 30, 1954,

[Title of District Court and Cause.]

No. 3122 Cr.

VERDICT No. 1

We, the jury, duly selected, impanelled, and sworn to try the above-entitled case, do find the defendant James Taylor Yokely guilty of the crime charged against him in count number one of the indictment;

And we do further find the defendant James Taylor Yokely guilty of the crime charged against him in count number two of the indictment.

Dated at Anchorage, Alaska, this 29th day of December, 1954.

/s/ JOHN M. ASPLUND,
Foreman.

[Endorsed]: Filed and entered December 30, 1954.

[Title of District Court and Cause.]

No. 3122 Cr.

VERDICT No. 2

We, the jury, duly selected, impanelled, and sworn to try the above-entitled case, do find the defendant Lena Mae Wilkins, guilty of the crime charged against her in count number one of the indictment;

And we do further find the defendant Lena Mae Wilkins, guilty of the crime charged against her in count number two of the indictment.

Dated at Anchorage, Alaska, this 29th day of December, 1954.

/s/ JOHN M. ASPLUND,
Foreman.

[Endorsed]: Filed and entered December 30, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL
AND NEW TRIAL

1. The defendant moves the Court for a judgment of acquittal as made at the close of all of the evidence under the provisions of Rule 29b.

2. The defendant moves the Court to grant him a new trial for the following reasons:

a. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

b. That the verdict is contrary to the weight of the evidence.

c. That the verdict is not supported by substantial evidence.

d. That the Court erred in giving instruction No. 12 in that the last sentence thereof is tantamount to an instruction of guilt.

e. That the Court erred in charging the jury and in refusing to charge the jury as requested, and particularly the Court erred in refusing to give defendant's proposed instruction No. 1.

f. That the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

1. The attorney for the government stated in his argument that a defendant, Lena Mae Wilkins,

did not take the stand and urged the jury that "a conspiracy existed and that it still exists" or words to that effect, by inference and innuendo insinuating that the failure of the co-defendant Lena Mae Wilkins to take the stand was an act of conspiracy between the two defendants existing at the time of trial and that the attorney for the government further alluded to the failure of the defendant Lena Mae Wilkins to take the stand in substance as follows: "Why did she not take the stand? What is she hiding?" or words to that effect, by innuendo inferring that the guilt of this defendant was thereby proved or admitted.

g. That the Court erred in denying the defendant's motion for a mistrial.

h. That the Court erred in admitting the government's Exhibit No. 1.

This motion is based on the records and files herein and upon the affidavit of the defendant hereto attached and by reference made a part hereof.

DAVIS, RENFREW &
HUGHES,

By /s/ JOHN C. HUGHES.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 10, 1955.

[Title of District Court and Cause.]

ORDER

The motion of defendant, by and through his counsel Davis, Renfrew & Hughes, having come on regularly to be heard and for good cause shown therefrom,

It Is Hereby Ordered that the defendant shall have until and including the 11th day of January, 1955, within which to renew motion for judgment of acquittal or in the alternative a new trial.

Dated: January 5th, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered January 5, 1955.

In the District Court for the Territory of Alaska,
Third Division
Criminal No. 3122

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JAMES TAYLOR YOKELY and LENA MAE
WILKINS,
Defendants.

JUDGMENT, SENTENCE AND COMMITMENT

On the 30th day of December, 1954, came Lynn
W. Kirland, Assistant United States Attorney, the

attorney for the government, and the defendants, James Taylor Yokely and Lena Mae Wilkins, appeared in person and by their counsel, Seaborn J. Buckalew, Esquire, and John Dunn, Esquire, respectively.

It Is Adjudged that the defendants have been convicted upon their plea of not guilty and a verdict of guilty of the offense of conspiracy as charged in Count I and Count II of the Indictment on file herein; and the Court having asked the defendants whether they have anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendants are guilty as charged and convicted.

It Is Adjudged that the defendant, James Taylor Yokely, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on each Count, said sentence on Count II to run concurrently with the sentence imposed on Count I, said sentence to commence and begin on the 30th day of December, 1954, and that said defendant stand committed until said sentence is served.

It Is Adjudged that the defendant, Lena Mae Wilkins, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on each Count, said sentence on Count II to run concurrently with the sentence imposed on Count I, said

sentence to commence and begin on the 14th day of January, 1955.

It Is Further Ordered that One (1) year of said sentence is suspended until the further order of this Court.

It Is Further Ordered that the Clerk deliver a certified copy of this Judgment, Sentence, and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendants.

Done in open Court at Anchorage, Alaska, on the 18th day of January, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed and entered January 18, 1955.

[Title of District Court and Cause.]

HEARING ON MOTION FOR A NEW TRIAL
AS TO DEFENDANT YOKELY

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time hearing on motion for new trial as to defendant Yokely, in cause 3122 Cr., entitled United States of America, plaintiff, versus James

Taylor Yokely and Lena Mae Wilkins, defendants, came on regularly before the Court, L. W. Kirkland, Assistant United States Attorney, appearing for and in behalf of the Government.

John C. Hughes appearing for and in behalf of the defendant Yokely. The following proceedings were had to wit:

Argument to the Court was had by John C. Hughes for and in behalf of the defendant Yokely.

Argument to the Court was had by L. W. Kirkland, Assistant United States, Attorney, for and in behalf of the Government.

Argument to the Court was had by John C. Hughes for and in behalf of the Defendant.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises denied motion for new trial.

Entered February 7, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now James Taylor Yokely, one of the above-named defendants, whose residence is Anchorage, Alaska, and whose mailing address is General Delivery, by and through John C. Hughes of Davis, Renfrew & Hughes, one of his attorneys, whose mailing address is P. O. Box 477, Loussac-Sogn Building, Anchorage, Alaska, and hereby gives

notice of appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment of conviction and sentence entered in the above-entitled matter by the District Court for the Territory (District) of Alaska, Third Division, on the 18th day of January, 1955, by the Honorable J. L. McCarrey, Jr., District Judge, pursuant to a verdict of the jury given on the 30th day of December, 1954, following which verdict the jury was on the same day discharged.

The sentence entered under such judgment and conviction was that the defendant James Taylor Yokely be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years on each of said counts, said sentence on the second count to run concurrently with the sentence imposed on the first count, said sentence to commence and begin on the 30th day of December, 1954, and that said defendant stand committed until sentence was served.

That on the 5th day of January, 1955, the Court made and entered an order herein enlarging time within which the defendant might renew his motion for judgment of acquittal or in the alternative a new trial, until the 11th day of January, 1955; that on the 10th day of January, 1955, defendant James Taylor Yokely renewed his motion for a judgment of acquittal and in the alternative a new trial which was denied by the Honorable J. L. McCarrey, Jr., on the 7th day of February, 1955.

The offense charged in the indictment was two counts of conspiracy of James Taylor Yokely and Lena Mae Wilkins with one another to violate a law of the United States of America, to wit: Section 2422, Title 18, USCA, namely, transportation within a possession of the United States of a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery.

That the defendant James Taylor Yokely is presently incarcerated in the Federal Jail, Anchorage, Alaska, having made his election not to commence serving sentence.

That at the close of the Government's case defendant moved for a judgment of acquittal on the grounds that as a matter of law from the evidence introduced, the defendant was not guilty of any offense and was entitled to be acquitted of the charge and that such motion was renewed at the close of all evidence and that the Court reserved decision on such motion, as above set forth, and the motion was renewed after the verdict and sentence and was overruled by the Court. That the defendant, at the close of all evidence, likewise moved the Court for a mistrial on the grounds that the District Attorney, in his argument, commented directly on the fact that the co-defendant Lena Mae Wilkins did not take the stand on her own behalf, which motion at the close of the trial was overruled and was further overruled as herein stated upon the motion for acquittal and in the alternative a new trial.

Dated at Anchorage, Alaska, this 10th day of February, 1955.

/s/ JAMES TAYLOR YOKELY,
Appellant.

DAVIS, RENFREW &
HUGHES,

By /s/ JOHN C. HUGHES.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

The above-captioned matter having come on regularly for hearing on the motion of the defendant for admission to bail and the Court having been fully advised in the premises and having heretofore under date of February 21, 1955, entered a minute order denying defendant's motion for admission to bail pending appeal, now makes and enters herein its memorandum opinion as follows:

1. That upon a review of the entire evidence and a review particularly of the arguments of the defendant's counsel that a substantial question of law is involved as to whether or not the Government's Exhibit No. 1 should have been admitted, the Court finds that the said Exhibit No. 1 was

properly admitted and that there is no substantial question of law involved therein.

2. That the demeanor of the defendant on the witness stand and in consideration of his testimony that he was a gambler and had not been employed in any other gainful occupation other than gambling since 1942 and has been convicted of numerous crimes the Court is of the opinion that the defendant is a poor moral risk and therefore as a second consideration is not entitled to bail pending appeal, the motion of the defendant for admission to bail pending appeal is accordingly denied.

Dated at Anchorage, Alaska, this 8th day of March, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 8, 1955.

In the District Court for the District of Alaska,
Third Division

No. Cr. 3122

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES TAYLOR YOKELY and LENA MAE
WILKINS,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr., U. S.
District Judge.

Appearances:

For the Plaintiff:

WILLIAM T. PLUMMER,

U. S. Attorney;

LYNN W. KIRKLAND,

Assistant U. S. Attorney.

For the Defendant, James Taylor Yokely:

SEABORN J. BUCKALEW, JR.,

Attorney at Law.

For the Defendant, Lena Mae Wilkins:

JOHN C. DUNN,

Attorney at Law.

Proceedings

The Court: Mr. Kirkland, is the Government ready to proceed with the case of United States of America, plaintiff, vs. James Taylor Yokely and Lena Mae Wilkins, defendants?

Mr. Kirkland: That is correct, your Honor.

The Court: Mr. Dunn, you represent the defendant, Lena Mae Wilkins. Are you ready to proceed at this time?

Mr. Dunn: Yes, your Honor, I am.

The Court: Is Mr. Yokely in the audience?

Mr. Kirkland: He and Mr. Buckalew just stepped out.

The Court: Very well.

(Thereupon, the defendant, James Taylor Yokely and his attorney, Mr. Buckalew, entered the courtroom.)

The Court: Mr. Yokely, are you ready to proceed at this time?

Mr. Yokely: Well, your Honor, I don't have an attorney to represent me at present.

The Court: Ladies and gentlemen of the jury, the court will go in recess for a few minutes. I would ask all counsel and the court reporter, including the clerk, to come into chambers, please.

(Thereupon, at 10:06 o'clock a.m. court went in recess at which time a pre-trial conference was had in the Judge's Chambers as follows): [4*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Let the record show this is a continuation of the court proceedings in the Judge's Chambers in order to be out of the hearing of the jurors, and at this time the court calls upon Mr. Yokely to explain why he doesn't have legal counsel this morning. I would like to let the record reflect that some two weeks ago Mr. Yokely was advised that the case would come on for trial at this date and a day or two afterwards, at his behest, he came into court and a proceedings was had for a continuance. Also, his counsel at that time, Mr. Seaborn J. Buckalew, requested a continuance because he and his counsel had not worked out a proper financial agreement among themselves and at that time in court Mr. Yokely and Mr. Buckalew assured the court that it would be satisfactory to proceed on the day set down for trial since they had tentatively agreed upon an arrangement. Now, last Friday, as I recall, the record will reveal that a motion was filed by Mr. Buckalew at the request of you, Mr. Yokely, advising the court that Mr. Buckalew no longer represented you and you made no request for continuance at that time. The court called Mr. Buckalew this morning and asked him to be in court in order that we could have an explanation as to what happened in respect thereto. Now, can you explain to the court why it is that you do not have counsel ready to proceed with the trial this morning?

Mr. Yokely: Well, your Honor, Friday, Mr. Buckalew and I had a little disagreement about my case and I asked him if he would mind giving me a

release and he did and I left his office [5] and went to several other attorneys and tried to get one. I explained to them that my trial was coming up Monday and they all thought that it wouldn't be fair to them nor to me if they would take my case without having proper time to defend me, and I just couldn't get one.

The Court: What right do you feel you have now at this late date to discharge the attorney and expect the court to grant you a continuance?

Mr. Yokely: I am not asking for a continuance. I am just asking for a little fairness. I tried to have an attorney to represent me, but none of them would take my case under such short notice. I am not trying to evade from going to court.

The Court: But you discharged Mr. Buckalew——

Mr. Yokely: No, I left right out of Mr. Buckalew's office trying to get me an attorney.

The Court: I realize that, but you knew that any attorney likely would come in with that position because of the fact that there wasn't sufficient time.

Mr. Yokely: I wasn't aware of that.

The Court: Well, the court feels at this time that the trial should proceed and that the court plans on appointing Mr. Buckalew as your attorney because he knows the facts and do you have any other counsel that you want to have in there with him?

Mr. Yokely: The court plans to——

The Court: If you can't work out something then the [6] court is going to have to appoint Mr.

Buckalew to go to trial anyway. He is the only one that knows the case and is prepared to go to trial, in part only.

Mr. Yokely: Whether I want him to represent me or not?

The Court: That is right. You can't flaunt justice.

Mr. Yokely: I am not trying to.

The Court: With the type of action you have indicated towards the court—you knew as well as anybody that if you should fire him Friday that would be good grounds possibly for you to get a continuance.

Mr. Yokely: I am not that well up on the law. If I was I probably wouldn't have done that.

The Court: Well, but——

Mr. Yokely: I didn't have that in my mind.

The Court: You have known for 2 weeks or more this was coming up for trial at this time.

Mr. Yokely: I was scheduled for the 16th.

The Court: Now, it is the 20th and we are not ready to go to trial.

Mr. Yokely: And I didn't release him on the 16th. If I had had that in mind it looks like I would have released him before the 16th when I was scheduled.

The Court: Regardless of what it looks like it is up for trial now and you are not prepared to go to trial because you don't have counsel. [7]

Mr. Yokely: I don't want you to think I had that in mind. I am not scheming anything. I am just trying to defend myself as much as possible.

The Court: Well, that is why the court is——

Mr. Yokely: I think I am due that much consideration.

The Court: That is why the court has given you 2 weeks notice, to get yourself squared away on that basis.

Mr. Yokely: I think 2 weeks is awfully short notice. I haven't had near as much consideration as other people.

The Court: I point out to you that you have been in jail for about 90 days, have you not?

Mr. Yokely: Yes, sir.

The Court: And also the indictment was returned——

Mr. Yokely: Secret indictment was returned on me.

The Court: ——on the 18th day of November, it was published.

Mr. Yokely: Beg your pardon.

The Court: It was published on the 18th day of November. So you had more than a month. Where do you feel you haven't had the proper notice?

Mr. Yokely: I don't think I got the secret indictment before it was returned or until about the last of November.

The Court: Well, even so then you have had 3 weeks in December. The District Attorney's office has the right to determine which cases they want to try. That is their prerogative. [8] I didn't set this case at my request. It was set down at the request of the District Attorney.

Mr. Yokely: All the other cases that came up behind me I see they are on the calendar for February and May and everything. I am a taxpayer here and I feel I do as much as the other people.

The Court: Excepting this, Mr. Yokely, I point to you, as I just did a moment ago, that the District Attorney determines when these cases will be tried.

Mr. Yokely: For what reason?

The Court: Because it is their right.

Mr. Yokely: That they push me like that?

The Court: It is their right.

Mr. Yokely: I don't have time to try to defend myself at all. I have been in a whirlwind ever since I have been out, everything has just been pushed on me.

The Court: Well, I point out to you, you admit yourself that you have known for 3 weeks——

Mr. Yokely: I only got out of custody the 7th, your Honor.

The Court: Yes. Well, that is over 2 weeks, about 2 now.

Mr. Yokely: Do you feel that is proper time for me to try to defend myself when the Government has had a hundred or more days trying to build up a case on me and I am going to have 2 [9] weeks to try to defend myself?

The Court: I point out to you there are many defendants that go to trial and never get outside of jail.

Mr. Yokely: I wasn't even notified until 3 weeks ago.

The Court: Well, the court feels that I haven't any choice——

Mr. Yokely: I have a right to try to defend myself.

The Court: You have had, as you say yourself, you have known about this for 3 weeks. You were in jail for a period of time. You knew why you were in jail.

Mr. Yokely: Yes, sir, that is true.

The Court: You have been notified by the court for over 2 weeks that the case was coming up for the 16th.

Mr. Yokely: And I had me an attorney.

The Court: Now, are you taking the position that because you couldn't go to trial on the 16th you can't go to trial on the 20th?

Mr. Yokely: No, just something came up that me and Mr. Buckalew disagree on and I asked him to release me. I didn't have this on my mind, trying to get a continuance then. I was all set to go to court on the 16th.

Mr. Buckalew: Your Honor, I think Mr. Dunn can probably verify that because he worked with me for about 4 days. He could probably see trouble coming up between my client and myself. [10]

Mr. Dunn: That is right, your Honor. The defense that I had prepared for the defendant Wilkins was prepared jointly with Mr. Buckalew. We felt the cases were so closely tied together it was necessary we cooperate and it was just right up to the last, I think it was Friday—I believe Mr.

Yokely discharged Mr. Buckalew Thursday, if I am not mistaken.

Mr. Yokely: Friday, wasn't it?

Mr. Buckalew: He discharged me Friday morning.

Mr. Dunn: Than I learned right after that—it would be the 17th I think—and it is true that Mr. Yokely was preparing with Mr. Buckalew. I know that of my own personal knowledge and so was Wilkins preparing with Buckalew in that Buckalew and I were cooperating with each other.

The Court: Well, Mr. Kirkland, what position do you take?

Mr. Kirkland: We are prepared to go to trial, your Honor. That is the only position I can take.

Mr. Plummer: We have witnesses subpoenaed and some of them have been here since Saturday.

The Court: That is the position the court takes. The defendant cannot defeat the ends of justice——

Mr. Yokely: I am not trying to defeat the ends of justice.

The Court: Just hear me out, please. By not being prepared to go to trial when the court feels you have had sufficient [11] notice.

Mr. Buckalew: Your Honor, I think the court probably ought to inquire of the Government's attitude. I don't know—Mr. Yokely says he doesn't want me under any circumstances and it is a question of ethics, and it is a very serious question in my mind as to whether the Government is going through a useless act of having a trial this morning.

Mr. Kirkland: I don't know if Mr. Buckalew could represent him or not.

Mr. Buckalew: Suppose he doesn't talk to me during the trial and he doesn't want me now.

Mr. Dunn: You see, that puts me in a bad spot, too, your Honor, because if you appoint Mr. Buckalew and Yokely won't cooperate with Buckalew it makes it impossible for Buckalew to cooperate with me.

The Court: Yes. In that respect, Mr. Dunn, the court feels that you should have some consideration and if Mr. Yokely intends to urge upon the court that he doesn't want Mr. Buckalew in any way, shape or form then I think what the court will have to do is appoint you to assist Mr. Yokely, because you are court-appointed, too, as well as Mr. Buckalew. The court is not going to grant a continuance. I will tell you that now, Mr. Yokely, so you just make up your mind as to what position you want to take on it.

Mr. Dunn: Your Honor, if I may interrupt a second. [12] I don't want to tie Mr. Buckalew to help me. That is very generous, but I know his time is valuable and it is not necessary that he help me with Wilkins. It would have been a great aid had he helped me with Wilkins by representing Yokely because that is the way our prior defense was planned. He is certainly welcome to aid, but I don't think it is—I imagine he prefers not to. I don't know.

The Court: The court has expressed his opinion. Mr. Yokely, where do you stand?

Mr. Yokely: Your Honor, you understand I am facing a serious charge and that is the same thing I was telling you about, going to court and giving me so short notice of that. A man can't make up a decision like that just right off.

The Court: All right. Then we will give you 10 minutes to think it out.

Mr. Yokely: 10 minutes?

The Court: Yes.

Mr. Buckalew: Your Honor, I would like to say one more thing. I don't want to delay this trial at all and I think the record should show that I advised Mr. Yokely when he wanted a release that I was prepared and willing to go to trial, but it was up to him. I made an appearance even though certain financial arrangements were not handled. I told him that had nothing to do with it. I was his attorney of record and prepared to go to trial. Mr. Yokely then told me that my analysis of the case and [13] what he thought should be done were so different that he didn't have any confidence in my analysis of this particular case, and for that reason he released me.

The Court: I point out to you Mr. Yokely chose you, you didn't choose him.

Mr. Buckalew: I just hate, your Honor, to go into court and represent somebody that doesn't want me.

The Court: That is true, too, but we can't have people flaunting their own, shall we say, lawless attitude toward our judicial process at the court.

Mr. Buckalew: I don't think it is that, your Honor.

The Court: Not you. I am not referring to you, but Mr. Yokely.

Mr. Buckalew: Even Mr. Yokely in this situation because I don't think that he had it in his mind if he did create an argument with me and then force the court to appoint another attorney and in the course of the argument get a continuance.

The Court: Excepting this, he know the case was set for trial and knew when he fired you he had to get another counsel and he knew at that time it would take a little time to prepare for the trial of the case, so his motive looks bad on the record. You can't get away from it.

Mr. Yokely: I didn't have that in mind.

The Court: We are having this in Chambers because the jurors are the ones to find you guilty or not guilty so the [14] record need not be reflected to the jurors at all.

Mr. Buckalew: I should point out one thing to his honor, that the court probably should consider and that is, that Mr. Yokely couldn't under any circumstances file an oath he was a pauper. I mean, he has a Buick automobile, an equity in it, and some property that is mortgaged and I advised him that he would be committing another crime and he was in enough trouble without going into court and signing another oath.

The Court: Yes, I recall you called it to the court's attention at that time. At that time the court was considering appointing you at his behest

and then you advised the court, which the court appreciated. Well, the court will give you a few minutes to make up your mind as to what you want to do about the situation. I feel this is a situation which has been created by your own deliberate acts. Whether you did it intentionally or not, I don't know, I can't say, I am not here to pass on it, but because you don't have counsel at this time is no fault of the court.

Mr. Yokely: Is it your idea I did it intentionally?

The Court: I don't know, but the fact still remains that you at this time are not prepared to go to trial and why you are not ready to go to trial is because of your own decision and that is no fault of the court or the judicial system. It is your own fault.

Mr. Yokely: It is not my own decision. It is the [15] attorneys' decisions. I tried to get one, but they wouldn't take my case under such short notice.

The Court: But I point out to you, Mr. Yokely, it was your decision to get rid of Mr. Buckalew.

Mr. Yokely: That is right.

The Court: You made that decision yourself knowing full well this was set down for the 16th or to follow the case that was being tried at that time. Now the court will excuse you to think it over and make a determination, but you want to do something about it by 10:45. That gives you 20 minutes.

Mr. Buckalew: Just one second, your Honor. What is my position at this stage of the proceedings?

The Court: I would appreciate it very much if

you could stand by until that period of time and since you are familiar with the case, if Mr. Yokely isn't able to hire somebody else, the court feels he will have to appoint you.

Mr. Yokeley: I am able to hire someone else, but they wouldn't take my case, your Honor.

The Court: That is no fault of the court though, Mr. Yokely. How can I be at fault in that respect?

Mr. Yokely: Well, your Honor, am I not entitled to rights like other people?

The Court: You have been entitled to your rights. You have had 90 days.

Mr. Yokely: 90 days, your Honor? I didn't even know [16] about this case 90 days ago. That is the third time you have brought this up and you may be misled, but I didn't know anything about it in those 90 days. I was in jail. I only got the indictment the last of November.

The Court: All right.

Mr. Yokely: I didn't——

The Court: Let's assume what you say is true. You will admit you have known it 21 days, have you not?

Mr. Yokely: Yes, 21 days.

The Court: All right, under the circumstances the court feels that is sufficient.

Mr. Yokely: And I haven't been out 2 weeks, only 12 days.

The Court: That is no fault of the court.

Mr. Yokely: I couldn't do anything while I was in custody.

The Court: That is no fault of the court. I point

out to you that you have property here in town and you certainly should have been able to get out on bond. You have had 2 weeks since you have been out on bond.

Mr. Yokely: I couldn't get out on bond until my time was up, Your Honor.

The Court: You have been out for 2 weeks, have you not?

Mr. Yokely: Yes. [17]

The Court: All right. You feel that isn't sufficient time in which to prepare the case.

Mr. Yokely: I have to get an attorney and try to get money to hire an attorney. It takes 4 or 5 days.

The Court: Then when you get an attorney and he is all prepared then you fire him. I don't want to discuss it any further. You can go back into court at 10:45.

(Whereupon, at 10:28 o'clock a.m. the proceedings in Chambers were completed and at 11:00 o'clock a.m., court reconvenes, and the following proceedings were had:)

The Court: Mr. Buckalew, can you advise the court at this time what position you take with reference to the representation of Mr. Yokely?

Mr. Buckalew: May I approach the bench, your Honor?

The Court: You may.

(Thereupon, all counsel approached the bench along with the court reporter and the

following proceedings were had out of the hearing of the jury:)

Mr. Buckalew: Your Honor, I advised Mr. Yokely that he had one of two choices: He could go to trial without counsel, or perhaps have the court appoint me, or he could insist I go to trial on it and my client has elected that would probably be better than no counsel at all. [18]

The Court: Well, I point out to you, counselor, the law Clerk has gone into it and it is the opinion of the court at this time, based upon the law she has been able to find for me, that the court has the right to force him to trial even without counsel.

Mr. Buckalew: That was my opinion of the law.

The Court: That being the case then, and the position the court would take, would you please announce you do represent him from the table then?

Mr. Buckalew: Am I appointed?

The Court: What is your pleasure?

Mr. Buckalew: All right, I will take it, your Honor.

The Court: Very well. Now, under those circumstances, he will not have to sign a Pauper's Oath because he said he is not qualified to do so, which means——

Mr. Buckalew: If he ever gives me any money I will pay \$150.00 back into court.

The Court: Fair enough then.

(Thereupon, the court reporter and all counsel returned to their respective seats and the

following proceedings were had in the presence of the jury:)

The Court: At this time the court appoints Mr. Buckalew to represent Mr. Yokely and would you please draw 12 names and have them come forward. [19]

(Whereupon, the deputy clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit jurors until the jury of twelve jurors was complete. Before completion of the preemptory challenges, the court adjourned at 4:48 o'clock p.m., December 20, 1954, to the next morning, this case to be resumed at 9:30 o'clock a.m., December 21, 1954.) [20]

(Court is convened at 9:30 o'clock a.m., December 21, 1954, at which time the selection of the trial jury continued until the jury of twelve jurors was complete. Whereupon, said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the instructions of the court.)

The Court: Can Counsel come back at 1:30 o'clock?

Mr. Buckalew: We can, your Honor.

The Court: Very well.

Mr. Kirkland: Yes, your Honor.

The Court: Very well. Ladies and gentlemen of the jury, you are now excused to report back at 1:30. Now that you are impaneled I must instruct

you not to discuss this case among yourselves nor to permit others to discuss it with you. The court will remain in recess until the call of the gavel.

(Whereupon, at 12:00 o'clock noon the court continues the cause to 1:30 p.m. of the same day.)

(At 1:30 o'clock p.m., all counsel beeing present, the trial of said cause was resumed:)

The Court: Mr. Kirkland, you may make your opening statement.

Mr. Kirkland: Mr. Buckalew, Mr. Dunn, Judge McCarrey, [22] and ladies and gentlemen of the jury: The Grand Jury in this case has returned an indictment of two counts charging the defendants, Lena Mae Wilkins and James Taylor Yokely for the crime of conspiracy or conspiring to violate a law of the United States. Now, the first count of this indictment charges that on or about the 8th day of April at Anchorage, Alaska, the defendant, James Taylor Yokely and the defendant, Lena Mae Wilkins, agreed together or conspired together and planned that she would travel from Anchorage to Fairbanks. That upon her arrival in Fairbanks she would engage in the practice of prostitution. And the indictment further sets forth overt acts that the defendants committed together.

The first overt act mentioned in the indictment under Count I, after they had entered into the agreement to commit this crime, they did acts afterwards, and the first one alleged is that James Taylor Yokely did give the sum of \$33.00 to Lena Mae

Wilkins to purchase her ticket from here to Fairbanks. And it sets forth further that James Taylor Yokely drove her out to the International Airport. The indictment goes further, for the third act alleged, that the defendant, Lena Mae Wilkins, did travel to Fairbanks.

Now, the court will instruct you that it will only be necessary to prove one of those 3 acts, but the government will prove all of them to your satisfaction and probably more.

Now, the second count charges that the 2 defendants [23] conspired together with one another, that is, agreed, that the defendant, Lena Mae Wilkins, would travel from Fairbanks down to Kodiak and upon arriving at Kodiak she would conduct herself as a prostitute. The indictment charges the manner in which they had agreed and so forth, how she was to travel, and all of that. Now, the overt acts alleged under that one are as follows: (1) That James Taylor Yokely did give a sum of money to Lena Mae Wilkins to make this trip. It says the sum of \$75.00 to purchase a ticket on Alaska Airlines to Anchorage and then from Anchorage to Kodiak via Pacific Northern Airlines. (2) That on or about the 13th day of April—the court will, of course, instruct you as to time. There may be a variation of time element of a few days in this—charging that Lena Mae Wilkins did travel from Fairbanks to Anchorage via Alaska Airlines. Then on the following day that she traveled from Anchorage to Kodiak via Pacific Northern Airlines.

Now, I know this is the first case of this nature

that you have seen or heard of this particular situation and in order that you might follow the evidence and understand it as it is presented to you, the Government is going to offer and introduce into evidence the sworn statement, before the United States Commissioner here at Anchorage, of the defendant, Lena Mae Wilkins. In her statement every bit of this is set forth and many more things——

Mr. Dunn: Your Honor, I hate to interrupt counsel when he is addressing the jury. I know that normally that is improper, [24] but counsel should not comment on the contents of any statement that is to be offered in evidence until the admissibility of that statement has been established. I don't think there can be any question on it.

The Court: Objection sustained.

Mr. Kirkland: Very well. The Government will offer testimony from competent witnesses that this defendant, Lena Mae Wilkins, did everything that is alleged, along with the defendant, James Taylor Yokely, and the various other things which she made in a statement and there will be testimony to that effect. And right down the line this statement will be corroborated as to the various details, even down to telegrams that are signed. And there will, of course, be other evidence introduced to you from other witnesses.

I don't think that it will now be necessary that I prove she is a prostitute. I believe counsel has stipulated to that fact, or at least has admitted it to the jury.

We will offer evidence, in corroboration of this testimony, that the defendant did board the airlines as charged that she did. That she did go to the various places as charged. That she went there with the intent to engage in prostitution and that she sent money, as a result of this, to her co-defendant and co-conspirator, the one who entered into this agreement with her, James Taylor Yokely.

I am confident that if you listen to this evidence closely [25] that you will return a verdict of guilty as charged in a very short time. Thank you.

The Court: Very well. Counsel for the defendants may make their opening statements. I don't know who desires to speak first.

Mr. Buckalew: If it please the court, Mr. Plummer, Mr. Kirkland, and ladies and gentlemen of the jury: His Honor has appointed me to defend the defendant, James Taylor Yokely. This is my client.

Mr. Kirkland: Your Honor, I object to counsel's comment on being appointed or at least the record should show that he has been representing this defendant all along as a result of a financial agreement.

The Court: In that respect the objection is overruled. Counsel may refer to that.

Mr. Buckalew: His Honor appointed me to defend this man. The defense will prove, I think beyond a reasonable doubt, that the only crime James Taylor Yokely committed was the fact that he owns a piece of property down in East Chester area. The evidence will show that Mrs. Wilkins rented a room in Mr. Yokely's house from Mr. Yokely's brother

and she lived there in Mr. Yokely's house. The evidence will show that Mr. Yokely's wife was gone.

We will show that Mrs. Wilkins got just a little sweet on James Taylor Yokely and that James Taylor Yokely didn't return her affections as she thought he should. That the fact that her [26] feeling for Mr. Yokely wasn't returned she began to get bitter and she really got bitter, so one day she took on a heavy load of scotch and when she got all this scotch in her system she decided she was really going to throw the book to James Taylor Yokely. She did. The only thing is she made a mistake.

Mr. Kirkland: Excuse me, your Honor. He is not supposed to argue the case at this time.

The Court: That is true. Counsel is not supposed to argue. On the other hand, counsel, I think is commenting upon what the evidence will show—that she did get drunk and that she was going to get after Mr. Yokely. Now, you may proceed from that point.

Mr. Buckalew: The evidence will show that she indicated to James Taylor Yokely that she was going to throw the book to him and the evidence will show that James Taylor Yokely told her, "You can't do anything to me. I haven't done anything. Talk to anybody you want to." So we have this situation: The woman is intoxicated; she has thought about getting James Taylor Yokely; she figured, "If I can't have him, nobody else can. I will send him to McNeil Island," and that is the way this whole business got started.

Now, I am going to put Mr. Yokely on the stand

and Mr. Yokely is going to deny that he conspired with Lena Mae Wilkins to do anything. He is going to deny that she was sent to Fairbanks and to Kodiak under his control. He is going to deny that he conspired [27] with her to do anything. He is going to get on the stand and tell you that if she went to Fairbanks she went up there on her own.

Mr. Kirkland: Counsel has stated he is going to deny it. This is not the time for final argument. He may state what his defense is going to be, but not argue the case.

The Court: I think counsel has gone too far, Mr. Buckalew, in arguing.

Mr. Buckalew: I am sorry, your Honor.

The Court: Therefore, the objection will be sustained.

Mr. Buckalew: I have one other thing that I want to advise the jury. I don't think that Mr. Yokely is an all-American citizen. I think that he has done things that he probably shouldn't have done and all that will probably come out in the course of the trial, but there is one thing that I believe, when you hear the evidence on this particular charge that this man conspired with this woman to turn her out as a prostitute in Fairbanks and Kodiak, I think you will find there is no basis in fact for the indictment that was returned against this man. Thank you.

The Court: Very well. Mr. Dunn.

Mr. Dunn: If it please the court, Mr. Kirkland, Mr. Plummer, Mr. Buckalew, and ladies and gentlemen of the jury: I rather imagine that from the

questions I asked you people in choosing you to sit on this jury that you got the impression that [28] I felt like I had a pretty hard case on my hands. I do. I take a great deal of consolation, however, in my belief in the fairness of the American Judicial System and in the fair mindedness of a jury.

Now, Mr. Kirkland said that I had practically stipulated or admitted that my client is a prostitute. I don't know whether he intends to prove that or not. I can't disprove it. I can only rely on your fair mindedness. I think that what I will be able to prove and hence the reason for my questions to you concerning the responsibility of a drunk person as compared with a sober person is that the defendant, Lena Mae Wilkins, was drunk to the point of incompetency at the time a lot of this evidence, that Mr. Kirkland says he is going to use to prove all of these things, was obtained. I think I will be able to show you that as a result of her condition that the statement Mr. Kirkland referred to was given involuntarily. I think I will be able to show you that this woman was not capable of giving a voluntary statement at that time. I hope you will be on guard against evidence coming in the back door if it is held inadmissible at the front door.

There is no doubt in my mind but what the prosecution will be able to prove that the defendant, Lena Mae Wilkins, did on or about the time set forth in the indictment travel between the points mentioned. There is a serious doubt in my mind and I think you will probably end up with the same

doubt in your mind, [29] as to whether or not that traveling was a result of a conspiracy—a conspiracy which took place prior to the actual traveling which is the point in issue here, not whether or not she did in fact travel. I am going to keep a great deal of my evidence in front of you at all times.

If for any reason any of you were watching me awhile ago, just before we renewed the trial of this case, you may have noticed that I asked Mrs. Wilkins to sit at the end of the table, rather than to sit beside me. The reason I did that is that I want you people to observe her throughout the trial. I am not going to put her on the stand and if you watch her I think you will see why I am not going to put her on the stand. She would not be a very good witness. She is scared and——

Mr. Kirkland: If counsel is going to comment as why the defendant doesn't take the stand the Government is entitled to the same right to come back and comment as to their contentions as to why the defendant is not going to take the stand.

The Court: That is correct, counselor. You were proper when you stated that you did not plan to put her on the stand, but any comment beyond that, I think, is highly improper in an opening statement. It is argumentative and may be argued at the conclusion of the trial.

Mr. Dunn: I will renew it then.

Mr. Kirkland: I would have to object at that time if counsel argues at the end of the trial as to why. Then I have [30] every right, under the law,

to come in and argue from my viewpoint as to why the defendant didn't take the stand.

The Court: That is true. We will cross that bridge when we come to it, counselor.

Mr. Dunn: That is what I was hoping, your Honor. I don't see any point in dwelling at great length on an opening statement. You will see the evidence. I have spent enough time with you to believe that each of you will consider it fairly. Thank you.

The Court: Very well. You may call your first witness, Mr. Kirkland.

Mr. Kirkland: Call Mr. Sachen.

JOSEPH V. SACHEN

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir?

A. Joseph V. Sachen, S-a-c-h-e-n.

Q. And your occupation?

A. Special Agent for the Federal Bureau of Investigation.

Q. And during the month of September of 1954 were you so employed? A. Yes, sir [31] .

Q. How long have you been employed as an agent, Mr. Sachen?

A. Approximately 4 years.

Q. When did you come to the Anchorage area?

(Testimony of Joseph V. Sachen.)

A. I came to the Anchorage area about the first of April.

Q. About the first of April. Mr. Sachen, did you have an occasion to interview the defendant, Lena Mae Wilkins, on September 7, 1954?

A. Yes, sir, I did.

Q. And at that time did the defendant make any statement to you? A. Yes, she did.

Q. Was that statement reduced to writing?

A. Yes, it was.

Q. And after that statement was reduced to writing was the defendant later taken before the United States Commissioner and did the defendant, Lena Mae Wilkins, swear to the truth of that statement? A. Yes, she did.

Q. Is that your signature, sir?

A. That is my signature, yes.

Q. Now, Mr. Sachen, going back. How did you happen to interview the defendant, Lena Mae Wilkins?

A. On the morning of September 7 when I appeared in my office there was a note for me stating that Lena Mae Wilkins was down at Honnicutt's and wished to give me a statement regarding [32] her being transported by James Yokely for the purpose of prostitution.

Q. Now, did you then——

Mr. Dunn: Objection, your Honor. I move to strike the witness' answer there because part of it is hearsay. He is testifying to what that note said. We don't know who wrote that note or anything

(Testimony of Joseph V. Sachen.)

about it. He is testifying to someone else's word.

Mr. Kirkland: Excuse me. If the court please, counsel in his opening statement went into great length as to the involuntariness of this statement and I wanted to get everything before the jury as to how this statement occurred.

Mr. Dunn: I ask, your Honor, that he get it before the jury by keeping within the rules of evidence. I don't want him to get it before the jury by the use of hearsay testimony.

The Court: Objection sustained.

Q. (By Mr. Kirkland): Did you interview the defendant, Lena Mae Wilkins?

A. Yes, I did.

Q. And did the defendant make any statement to you? A. Yes, she did.

Q. What were those statements, Mr. Sachen?

Mr. Buckalew: Your Honor, at this time, on the part of my client I would like to object to any statements that Lena Mae Wilkins made to Mr. Sachen because it is certainly hearsay, [33] inadmissible against the defendant Yokely.

Mr. Kirkland: If the court please, I would like to be heard on that.

The Court: Very well.

Mr. Kirkland: The law would uphold that the statement the defendant made would not be hearsay. Only the truth of those statements would be hearsay and is a matter for the jury to decide.

The Court: Mr. Buckalew.

(Testimony of Joseph V. Sachen.)

Mr. Buckalew: I take the position, your Honor, that it is purely hearsay. It is a statement made not in the presence of Mr. Yokely.

The Court: I point out to you though, counselor, in a case of this kind we have two legal points to be determined. One of them is the rights of Mr. Yokely and the other is the admissibility of the evidence as pertains to Mrs. Wilkins and their witnesses in respect thereto. Now, since the crime charged is that of co-conspiracy and both defendants are before the court in one cause of action it is the opinion of the court that your objection is not founded on the law. Therefore, the objection will have to be overruled, but before ruling finally I would like to hear you further if you would like to be heard on that point.

Mr. Buckalew: Your Honor, I would like to make one more observation. This statement was given, I think Mr. Sachen said on the 7th of September. [34]

The Court: Yes, that is correct.

Mr. Buckalew: If the conspiracy did exist it certainly had terminated on the 7th of September and it is my understanding of the law of conspiracy that there must be—for any statement made by Mrs. Wilkins to be admissible against Yokely it must have been made during the life of the conspiracy. This statement was made after the conspiracy terminated and it is clearly hearsay and inadmissible.

Mr. Kirkland: Does the court desire to hear argument on that point?

(Testimony of Joseph V. Sachen.)

The Court: Yes, I do.

Mr. Kirkland: If it please the court, I would like to cite the case of Simpson vs. United States, which is a 9th Circuit Court of Appeals case, our circuit.

The Court: Where is it found, counselor?

Mr. Kirkland: Excuse me, your Honor, 289 F. 188. That, your Honor, was a conspiracy case which was tried down at Juneau, I believe, and that particular point was raised in that case. The court in its Opinion states: "There can be no question of the general rule that, after the abandonment of a conspiracy, the acts or declarations of a conspirator are not admissible against his co-conspirators. 'However, there is a distinction between an abandonment of a conspiracy and the abandonment of the object thereof, and acts or declarations of co-conspirators are admissible where, at the time they were done or made, although the object had been abandoned, the conspiracy continued for the purpose of [35] avoiding detection or exposure.' "

Now, as the facts will bring out in this case, this defendant was still desirous of keeping it hidden and the statement was made to support a white slavery complaint against this defendant, but not as to the conspiracy. Now, going one point further——

The Court: Just a moment, please.

Mr. Buckalew: Excuse me, your Honor, could I ask that the jury be excused.

The Court: If you think it is detrimental.

Mr. Buckalew: I think it is, your Honor.

(Testimony of Joseph V. Sacken.)

The Court: What is your position?

Mr. Kirkland: I have no objection as to whether the jury is excused or not.

The Court: Are you about concluded or——

Mr. Kirkland: Yes, your Honor, I have about 4 more sentences I want to say.

The Court: Well, I wish you would bear in mind, Mr. Kirkland, as you argue this fact, the fact that the jurors are still here and, therefore argue the law and not the particular set of facts in this particular case.

Mr. Kirkland: Very well, your Honor. I believe the general rule of law on that point, as to after the conspiracy ended goes to acts or declarations after the conspiracy has ended. That is, such as a threat to a witness which—of course, assuming that one conspirator threatened a witness after the conspiracy was [36] over—that, of course, would be evidence of guilt against that co-conspirator and is the general rule to which, I believe, Mr. Buckalew is referring. That particular piece of evidence would not be admissible against the other co-conspirator, but the facts and declarations to which this witness is testifying to are acts and declarations that occurred during the conspiracy and I contend that is one of the distinctions.

The Court: Did you want to reply to that, Mr. Buckalew? The court hasn't read the case, Mr. Buckalew, but it is the opinion of the court, as I announced heretofore, that we have 2 questions of evidence to consider and the rights of the 2 defend-

(Testimony of Joseph V. Sachen.)

ants, and the court is of the opinion that is admissible for the reason Mr. Kirkland gave, however, I would like to hear you further.

Mr. Dunn: If the court please, I would like to be heard on this in respect to the defendant, Wilkins.

The Court: Very well. Do you feel the jury should be dismissed before you——

Mr. Dunn: I think it is in keeping with established practice, your Honor. It is strictly a matter of law and not a matter of fact. I don't think it can do anything other than possibly confuse the jury or enable the jury to hear from the counsel facts which may eventually prove inadmissible to the jury.

The Court: Very well. Then, ladies and gentlemen of the jury, the court will have to excuse you.

(Whereupon, the jury left the jury box [37] and retired to the jury room to await being called, and the following proceedings were then had, in the absence of the jury:)

Mr. Dunn: Now, if I understood Mr. Kirkland correctly, your Honor, he cited this case as authority for his contention that the facts to which this witness is about to testify are admissible as facts occurring during the conspiracy.

The Court: That is correct.

Mr. Dunn: Now, if he claims that this conspiracy continued for any reason at all to avoid prosecution or for any other reason up to the time of these alleged statements, that would be September

(Testimony of Joseph V. Sachen.)

7 as I have it, then I take it that that is a preliminary fact which would have to be established prior to the admitting of the evidence itself.

The Court: Excepting this, counselor, how would it be physically possible to have that fact known until the evidence was in so you could find out?

Mr. Dunn: Well, that, fortunately, as far as I am concerned, is Mr. Kirkland's problem, not mine.

The Court: But then the court has to rule on it.

Mr. Dunn: Well——

The Court: How can I rule on something that is not before me?

Mr. Dunn: I am trying to get it before you right now. If it is admitted law that the facts to which Mr. Sachen is about [38] to testify to are inadmissible unless they took place during the conspiracy. If that is admitted, as I understand it is, then surely as a matter of reason those facts cannot come in until the continuation of that conspiracy is established. Now, how Mr. Kirkland can do that I don't know. As a matter of fact, I rather doubt if he can. That is one of the reasons I am objecting here, but if he can't by his own case—as I understood him to read it, I haven't read it—the statements are inadmissible. Now, further, I would like to cite to the court *Ellis vs. United States*, 138 F. 612, and *United States vs. Groves, et al.*, 122 F. 2d 87, as authority for the proposition stated by Mr. Buckalew that a statement made after the conspiracy, if indeed there was a conspiracy, is inadmissible. I don't think—

(Testimony of Joseph V. Sachen.)

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Mr. Dunn: Now, if he claims that this conspiracy continued for any reason at all to avoid prosecution or for any other reason up to the time of these alleged statements, that would be September

(Testimony of Joseph V. Sacher.)

7 as I have it, then I take it that that is a preliminary fact which would have to be established prior to the admitting of the evidence itself.

The Court: Excepting this, counselor, how would it be physically possible to have that fact known until the evidence was in so you could find out?

Mr. Dunn: Well, that, fortunately, as far as I am concerned, is Mr. Kirkland's problem, not mine.

The Court: But then the court has to rule on it.

Mr. Dunn: Well——

The Court: How can I rule on something that is not before me?

Mr. Dunn: I am trying to get it before you right now. If it is admitted law that the facts to which Mr. Sacher is about [38] to testify to are inadmissible unless they took place during the conspiracy. If that is admitted, as I understand it is, then surely as a matter of reason those facts cannot come in until the continuation of that conspiracy is established. Now, how Mr. Kirkland can do that I don't know. As a matter of fact, I rather doubt if he can. That is one of the reasons I am objecting here, but if he can't by his own case—as I understood him to read it, I haven't read it—the statements are inadmissible. Now, further, I would like to cite to the court *Ellis vs. United States*, 138 F. 612, and *United States vs. Groves, et al.*, 122 F. 2d 87, as authority for the proposition stated by Mr. Buckalew that a statement made after the conspiracy, if indeed there was a conspiracy, is inadmissible. I don't think—

(Testimony of Joseph V. Sachen.)

well, I won't argue that because I am getting into Mr. Buckalew's field here. Only those 2 points, your Honor. Thank you.

The Court: Very well.

Mr. Kirkland: If the court please, I would like to be heard.

The Court: Let's keep order in this. The court hasn't heard Mr. Buckalew yet.

Mr. Buckalew: Your Honor, I believe that the case cited by Mr. Kirkland is clearly distinguishable from the general proposition of law that acts or declarations of one conspirator made after the termination of the conspiracy is inadmissible. Now, the case Mr. Kirkland cited, from the facts it appears that [39] there was a general conspiracy to transport whiskey between, apparently, Canadian waters and Alaskan waters. While the conspiracy was alive they were in the process of violating the law. They were apprehended. The Coast Guard Cutter chased them or something and actually it was so closely tied to the conspiracy that actually it was part of the conspiracy. They hadn't even had a chance to terminate the conspiracy. I want to point out to his Honor that the indictment here charges that on the 8th day of April they did so and so. That is in the first count. Now, the second count, that on the 13th day of April they did so and so. Now, some 6 months later this defendant makes a statement to Mr. Sachen. Now, there can't be any question about it—

(Testimony of Joseph V. Sachen.)

The Court: Just a moment, please. Doesn't it relate back to the acts of the 8th and 13th?

Mr. Buckalew: I don't know what is in the statement.

The Court: That being the case then, aren't you arguing something you don't know?

Mr. Buckalew: I know this, your Honor—from what I know about it and from the face of the indictment that the conspiracy must have been over because she says on the 8th day of April they conspired. On the 13th of April they conspired to do so and so. Now, 6 months later she gives a statement.

The Court: Excepting this: Mr. Kirkland argues they may not make a statement after the conspiracy unless it reverts back to the acts done at the time of the conspiracy. I think that [40] is the point you have overlooked.

Mr. Buckalew: I don't think Mr. Kirkland said that. I don't want to disagree with the court, but I don't believe that is what Mr. Kirkland said.

The Court: I am afraid the record is to the contrary.

Mr. Buckalew: I wish his Honor would take the time to read the case cited by Mr. Kirkland. I think you would clearly see it is distinguishable.

The Court: Of course, under what you state to the court it is obvious there is a difference as to the point of time. Then you haven't argued the point, counselor. You haven't met the argument, as I see it, that Mr. Kirkland has propounded. That is, the

(Testimony of Joseph V. Sachen.)

general premise of conspiracy cannot be brought into evidence if by chance it comes after, but it may be admitted if by chance it reverts back to the time that the acts were in fact committed and for which the defendants are charged.

Mr. Buckalew: Your Honor, I will just take a minute to read from the case cited by the Government and I quote, "There can be no question of the general rule that, after the abandonment of a conspiracy, the acts or declarations of a conspirator are not admissible against his co-conspirators. 'However, there is a distinction between an abandonment of a conspiracy and the abandonment of the object thereof, * * *'" Now, in the case cited by Mr. Kirkland you have conspiracy to transport alcohol; the transporting of alcohol from Canadian waters to Alaskan waters. [41] They catch them in a boat that has got whiskey on it. Now, the indictment here alleges that on the 8th day and on the 13th day of April they conspired to go to Fairbanks and then to Kodiak. We know that conspiracy has terminated. There is no question about it. It is not the same situation at all, your Honor, as transporting whiskey from Canadian waters to Alaskan waters. I mean, that is something that is continuing.

The Court: That is right, but you cite this particular case as being distinguishable upon the facts, but you don't differentiate between the general statement of law in that case from the proposition Mr. Kirkland urges upon the court at this time.

(Testimony of Joseph V. Sachen.)

Mr. Buckalew: As I understand the general statement of the law——

The Court: Let's not go into the general statement of the law. I would like to have you meet his proposition in your argument.

Mr. Buckalew: I think I have met it, your Honor, because from the case that he cited to the court it seems to me that the conspiracy had not terminated.

The Court: Well, the court takes a different view.

Mr. Dunn: May I take another crack at it?

The Court: Well, we have got to terminate this somewhere.

Mr. Dunn: Here is the thing. I now have a little [42] different understanding of what the court's position is than I had when I spoke a moment ago. I think I can answer your question.

The Court: Well, you may proceed then. I will hear Mr. Dunn then I will hear you, Mr. Kirkland.

Mr. Dunn: Now, as I understand the court's present thinking it is this—I will continue and if I am wrong I will stop—the court is considering as a fact that an admission or a statement of a defendant subsequent to the termination of the conspiracy is admissible if the facts contained in the statement are concurrent in time or relate back to the conspiracy. Now then that is answered, I believe, your Honor, by the 2 cases that I just cited and I have only the footnotes in the U. S. Code, but one of them is this: “In prosecution for transporting in

(Testimony of Joseph V. Sachen.)

interstate commerce girls for immoral purposes, testimony that during investigation of case—now, that is subsequent to the conspiracy, your Honor—the girls, an investigator, an assistant state prosecutor and father of one of girls located and identified cabin in which the girls stated that they and defendants had once tarried illicitly which was hearsay and incompetent.” Now, the facts contained in the statement mentioned in this case relate back to the time it was held hearsay and incompetent.

In the second case, that of *United States vs. Groves*, it was to the effect that where it was shown—and I am paraphrasing this—that shortly after indictment was returned the defendant had removed papers from a Montreal bank vault and had sought to [43] have them destroyed. Testimony was that co-defendant had said to his wife that the papers were just evidence of what the Government wanted and that it was very awkward—that the defendant could not burn them and was inadmissible against defendant as hearsay constituting a narrative statement made after the termination of the conspiracy. Now, if I understand that case correctly it says, “Narrative made subsequent to the conspiracy is inadmissible whether the facts contained in the narrative go back to the time of conspiracy or not,” and that is the first case dealing with facts that were concurrent in time with the conspiracy and that testimony was held inadmissible.

The Court: Let me attack it from a different viewpoint. You do not take the position, do you,

(Testimony of Joseph V. Sacken.)

that statements contrary—well, suppose that the evidence—the defendant may at this time get on the witness stand—and argued as not admissible, do you? Conflicting statements made by the defendants? Let's assume they were to be called as witnesses and they would be called as a witness, surely you don't take the viewpoint that a prior statement, even in conspiracy, could not be admitted to show inconsistencies.

Mr. Dunn: Your Honor, I admit readily that any statement made prior in time inconsistent with the present testimony of a witness may be admitted for the purpose—my admission goes no further than of impeaching that witness.

The Court: Aren't we in about the same position here now? Could not the court come along and instruct the jurors [44] that they would have to take into consideration the truthfulness of the statement itself.

Mr. Dunn: That, of course, is a wholly collateral matter, but I don't think that it is a correct ruling for the court to say that if under a different set of circumstances, namely, for the purpose of impeaching a defendant who had taken the stand on certain statements to come in, that those statements may come in under any set of circumstances.

The Court: Well, you have had your say.

Mr. Buckalew: Your Honor, could I——

The Court: No, the court has heard you twice.
Mr. Kirkland.

Mr. Kirkland: If the court please, Mr. Dunn in

(Testimony of Joseph V. Sachen.)

citing the last case, the one about burning the papers, I believe that was the Groves case—I don't know whether counsel read that case or not. I read the case and I wouldn't swear to the facts as he stated here, but I believe that case will support my contention because in that case it was where one person is talking to his wife, a co-defendant, and he says to the other man, "I didn't burn the paper." This is after it is ended; after they are caught. He said, "I didn't burn the papers because it was hard to get rid of them." Now, that was admissible against him, but not against the co-conspirator because it is something conjectured after it has ended.

Now, in Mr. Buckalew's case, regarding catching them in a boat, [45] well, now if Mr. Buckalew read the case, the facts, I believe that he will discover the statements were made much later after they were caught and the conspiracy had terminated, but it went to the acts that occurred during the conspiracy.

I would like further to cite a 1952 case decided by the Supreme Court of the United States, found in 346 U. S. 156. Now, that goes to the admissibility of confessions and statements as to how they apply to the third party.

The Court: But does it refer to the question of conspiracy?

Mr. Kirkland: Not conspiracy itself, but it is where the defendants are jointly charged. There are 3 defendants and 2 of them made statements

(Testimony of Joseph V. Sachen.)

and as to the admissibility of those statements against the third party.

The Court: The only thing the court is concerned about at this time is the question of conspiracy. The court is well aware of that other doctrine. I have already indicated that we have 2 public policies that we must consider.

Mr. Kirkland: There is one more point which is probably the most important point that I should urge at this time and that is that counsel's objection and all of his cases have to do with written statements going into evidence. At this time I have not even offered that statement into evidence and, of course, counsel can read from that to refresh his memory. There is no question whatsoever about that and the court will even [46] instruct the jury to view with caution oral admissions. Now, at this stage it is admission because I haven't offered it in evidence.

The Court: That was the point I made sometime ago. We are arguing about something we don't even know at this time and I felt it was premature. However, it is just as well we have argued it out and come to a conclusion on the matter. Are you through now?

Mr. Kirkland: Yes.

The Court: Objection overruled.

Mr. Buckalew: Permit me to make one more comment.

The Court: No, the court has ruled. You may call the jury back.

(Testimony of Joseph V. Sachen.)

Mr. Buckalew: What was His Honor's ruling on that?

The Court: That the objection is overruled.

Mr. Buckalew: What does His Honor propose to let into evidence?

The Court: Nothing at this time because nothing has been offered in evidence.

Mr. Buckalew: His Honor wouldn't have any objection to renewing the objection and arguing it at a later date?

The Court: No, surely not.

(Thereupon, the bailiff recalls the jury and the jury returns to the courtroom, thereafter the following proceedings were had:)

The Court: You may proceed, Mr. Kirkland.

Q. (By Mr. Kirkland): Mr. Sachen, do you remember the last question that was asked you?

A. Not very well, Mr. Kirkland.

Q. Very well, I will repeat the question. This statement the defendant made to you, what was the contents of that statement?

A. The general contents of that statement was——

Q. You can refresh your recollection, if you desire, sir.

A. Do you want me to start right from the beginning, Mr. Kirkland, or do you want me to——

Q. That is right, from the beginning.

A. Right at the time of the meeting Mrs. Wilkins——

(Testimony of Joseph V. Sachen.)

Mr. Buckalew: Your Honor, for the record I am going to have to object again to his reading anything from the statement.

The Court: He isn't reading. I understood it was not to be read.

Mr. Buckalew: He is going to refresh his recollection and then tell the jury what is in it.

The Court: Yes.

Mr. Bukalew: I object to it on the grounds that it is inadmissible.

The Court: What is your position, Mr. Dunn?

Mr. Buckalew: That the conspiracy has terminated and it is not admissible against my client, Mr. Yokely. [48]

The Court: Very well.

Mr. Dunn: Your Honor, I join in the objection on behalf of the defendant, Wilkins, and I ask the court if it is not proper that defense counsel requests permission to examine this statement. I would like to see what it is.

The Court: You may do so. The statement may be handed to counsel for the defendants. I wonder if this wouldn't be an opportune time to take a 10-minute recess. We have been in session for an hour now and you will have a chance to study it better. Court will stand in recess for 10 minutes.

(Whereupon, at 2:35 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had:)

The Court: Let the record show all the jurors

(Testimony of Joseph V. Sachen.)

are back and present in the box. Mr. Dunn and Mr. Buckalew, have you had a chance to study this particular document?

Mr. Dunn: We have, your Honor.

Mr. Buckalew: We have, your Honor.

The Court: You may proceed then, Mr. Kirkland.

Q. (By Mr. Kirkland): Now, Mr. Sachen, will you relate the events leading up to the statement?

A. When I received the message that Mrs. Wilkins wanted to talk to me down at Hunnicutt's I immediately proceeded there with another agent. When we arrived at Hunnicutt's we [49] asked a bartender if Mrs. Wilkins was there. He stated she was not there.

Q. Excuse me—well, go ahead.

Mr. Dunn: Same objection to the hearsay.

The Court: Mr. Sachen, may the court advise you not to refer to hearsay testimony, that is, what somebody else told you unless the defendants were present themselves.

A. Yes, sir.

The Court: You can say, "I was informed," or "I was advised," but you must not state what they said.

A. When I arrived down at Hunnicutt's I was advised that Lena Mae had telephoned Ted Pass, Anchorage Police Detective, and that she was up at the Anchorage Police Department. I immediately proceeded up to the Anchorage Police Department

(Testimony of Joseph V. Sachen.)

where I met Mrs. Wilkins. I introduced myself by producing my credentials and she stated then she wanted to give me a signed statement implicating Yokely as transporting her from——

Mr. Buckalew: Your Honor, at this time I object to it on the additional ground that the statement was involuntary. At the time the statement was given to Agent Sachen, Lena Mae was in such a state of drunkenness she didn't have a capacity to act free and voluntary. In other words, she didn't have any control over her actions.

Mr. Kirkland: If he wants to argue I suggest we have [50] hearing out of the presence of jury or in the presence of jury if the counsel wishes.

The Court: No, it should be out of the presence of the jury. Counsel may approach the bench in respect thereto.

Mr. Dunn: I'd like to be on the record as joining in the objection, your Honor, on behalf of the defendant, Wilkins.

The Court: Very well. Now you may come to the bench and Mr. Kirkland, the court would like to have you come to the bench also.

(Whereupon, counsel for the plaintiff and the defendant approached the bench and the proceedings were out of the hearing of the jury.)

The Court: Now, Mr. Buckalew, you made an objection and stated as your grounds, she was drunk at that time. Now, there is nothing in the evidence to indicate that is true.

(Testimony of Joseph V. Sachen.)

Mr. Buckalew: As I understand the law, your Honor, it is probably a preliminary question. His Honor will have to interrupt the trial at this stage of the proceedings and hear evidence on it.

The Court: I think that is probably correct.

Mr. Dunn: I think that is correct.

Mr. Kirkland: That is correct.

The Court: We are all agreed on that. That being the case, the court will have to excuse the jury and then to rule upon the admissibility of the statement. [51]

Mr. Buckalew: Here is the position we are in, your Honor. We didn't realize that the statement was going to be attempted to be offered at this early stage. Probably take us—how long to get our witnesses?

Mr. Dunn: I think we can get one witness here in 15 minutes. Just how long it will take us to round them up I don't know. I think the defendant has friends in the court room with automobiles. We will send out for them immediately.

The Court: What is your position?

Mr. Kirkland: I am willing to have the hearing now. I can put mine on, and by that time, they can possibly have theirs here.

The Court: That is a good suggestion. Ladies and gentlemen of the jury, the court must accept and hear evidence at this time as to admissibility of certain documentary statements and this must be determined out of your presence. Therefore, the court will have to excuse you to retire to your jury

(Testimony of Joseph V. Sachen.)

room. The court will remain in session to hear this evidence.

(Thereupon the jury was excused and left the courtroom and the following proceedings were had:)

Mr. Kirkland: Could I request that the bailiff call the United States Commissioner and the City Magistrate, and please advise Mr. Fitzgerald in the United States Attorney's Office and request they come down to the courtroom.

The Court: Thank you. Can you do that for us, Mr. Hale, [52] please. Counselor, I wonder if you couldn't proceed with this witness at this time in respect to the question of proof.

Q. (By Mr. Kirkland): Mr. Sachen, now that the jury is gone will you tell in detail how you took this statement and what occurred until it was signed before the United States Commissioner under oath?

The Court: In that respect, counselor, isn't our only point to be determined at this time is whether or not the statement was voluntary or involuntary? Therefore, the other evidence that he is about to give, I do not believe would be germane to the determination legally of this question.

Mr. Kirkland: Possibly I misphrased it, your Honor. What I intended was how he got called to take it, the condition of the defendant, where he took the defendant and that proceeding, not as to the contents of the statement.

The Court: Well, you may do that then.

(Testimony of Joseph V. Sachen.)

Mr. Dunn: Your Honor, could I ask a favor from the court, that we stop here for just a couple of minutes while I give one of these people information as to where to go to get the witnesses I need.

The Court: You may.

Mr. Buckalew: Your Honor, could we have a recess at this point?

The Court: Would you like a 5-minute [53] recess?

Mr. Buckalew: Yes, sir.

The Court: Very well. The court will stand in recess for 5 minutes.

(Whereupon, at 2:50 o'clock p.m., following a 5-minute recess, court reconvenes and the following proceedings were had:)

The Court: You may proceed, Mr. Kirkland.

Q. (By Mr. Kirkland): Mr. Sachen, will you relate to the judge the facts and circumstances leading to the taking of this statement? How it was taken, the condition of the defendant and any acts that the defendant Wilkins made after giving this statement? I am confident that the hearsay will be absolutely admissible as to how you were notified. Am I correct, your Honor?

The Court: Of course, it is before the court, therefore, you will be given lots of latitude. The court must get at the facts in order to rule on this matter. You may proceed.

A. Your Honor, do you want me to start right from the beginning and say how I was notified?

(Testimony of Joseph V. Sachen.)

The Court: No.

A. Just the time I first met the defendant?

The Court: Yes, if you would, please.

A. I arrived at the Police Station. I introduced myself, as I previously said, and I asked her if she wanted to give a [54] signed statement. She said, "Yes, she did." I noticed she was drinking a little bit, but she wasn't drunk and I talked to her first to find out all the facts she had and then I started taking a signed statement exactly how she said it. After she got through I again said she did not have to sign this, that she had a right of counsel and anything she said might be held against her in any court of law. Then I asked her again if everything that she said was true and she said, "Yes, it was." I then proceeded to take her down to the Flats. She wanted to go down to the Flats so as we got about 2 blocks from 1806 East "I" Street, where she resided, she said, "Let me off here," and she would meet Mr. Pass and myself back at the Police Station at 1:00 o'clock. I gave her a dollar and she said she would take a cab back instead of us picking her up again at 1:00 o'clock. At 1:00 o'clock we met her at the station again. Mr. Pass at that time had some business to do with the City Magistrate, Mr. George McLaughlin. He said that she had signed another complaint on the charge of maintaining a bawdy house at this place. We went from there over to see the Assistant United States Attorney, Mr. Jim Fitzgerald. She read the statement and she made some corrections and initialed

(Testimony of Joseph V. Sachen.)

them. Mr. Fitzgerald asked her if everything was true in that statement and she said, yes, it was, and he stated that due to the fact her past record and character, [55] and due to the fact that she was a poor Government witness at one time that he would like to make this signed statement in affidavit form. So we proceeded to go down to the U. S. Commissioner's office where she swore that the statement was true and the U. S. Commissioner, Mr. Hartlieb, signed the statement.

The Court: Very well.

Mr. Kirkland: Now, I would like to ask the witness a few further questions.

The Court: Very well.

Q. (By Mr. Kirkland): Now, Mr. Sachen, as to the contents of that statement. Has the truth of the contents of that statement been verified?

A. When she gave me the statement our investigation showed that——

Q. Excuse me, I don't want to go into each and every part of our case until the proper time, but have you verified the truth of the contents of that statement, that is, as to letters mailed, telegrams, airplane rides, and so forth?

A. Yes, all but one leg of the hop has been verified. The dates were not exactly as she said, but they were quite close to the dates she said in the signed statement.

Q. Now, was the defendant drunk?

A. I wouldn't say she was drunk. She was drinking, I think, early in the morning because I

(Testimony of Joseph V. Sachen.)

could smell it on her. That [56] was, of course, around 9:00 o'clock that we interviewed her. In fact, I have an interview log of what time we started to interview her, what time we advised her of her rights, that she didn't have to say anything to me and anything she said might be held against her in court and also told her she had a right to counsel and that started at 9:20 in the morning. She was advised of her rights to counsel at 9:22 a.m. on September 7. The time of giving the information of her participation of the crime admitted was 9:25 and by the time I got through having the oral interview with her it was 9:40 and the time the statement was ready for dictation was 9:45. The time she signed the statement was at 10:20.

The Court: Which statement are you referring to? The one before Commissioner Hartlieb?

A. Yes, the statement in front of Commissioner Hartlieb, the signed statement she gave to me.

The Court: Very well.

Q. Now, that was in the morning. Then it was in the afternoon in the presence of Mr. Fitzgerald and also the City Magistrate, is that correct?

A. Yes, that was between—I will say between 1:00 and 1:30 when we went to the City Magistrate's office to sign another complaint against this house where she was living and then from there we proceeded over to the United States Attorney's office and talked to Mr. Fitzgerald. [57]

Q. Now, was the defendant unsteady on her feet? A. No, she wasn't.

(Testimony of Joseph V. Sachen.)

Q. Did she have trouble talking?

A. No, she didn't.

Mr. Kirkland: Your witness.

The Court: You may cross-examine, Mr. Buckalew.

Mr. Kirkland: Now do both counsel have the right to cross-examine each witness or——

Mr. Buckalew: I would think so, your Honor.

The Court: I think so. Ordinarily that is not true, but I think in this case since we have 2 defendants that each should cross-examine if they desire.

Mr. Dunn: Your Honor, we do have 2 defendants and I certainly think Mr. Buckalew is every bit as capable an attorney as I am, but I think it is a matter of common knowledge that attorneys approach things from different angles and I wouldn't want to be bound by what Mr. Buckalew has done and I am certain he wouldn't want to be bound by what I have done.

The Court: Excepting this, counselor, the court couldn't permit you to ask repetitious questions.

Mr. Dunn: Your Honor, you are putting each of us in the position of having to be satisfied with what the other elicits.

The Court: No, that isn't what I said. You just can't go over the same ground. Assume, for example, she testified it was 10:21 instead of 10:20 when she signed the statement. Now, [58] surely you wouldn't want to——

Mr. Dunn: I think we can rely upon Your

(Testimony of Joseph V. Sachen.)

Honor's fairness. If it becomes a problem we can discuss it.

The Court: I am sure of that. Very well, you may proceed then.

Mr. Buckalew: Just for the record I believe Mr. Dunn objected on the same grounds as I did, didn't he?

Mr. Dunn: To what?

Mr. Buckalew: To the admissibility of this statement.

Mr. Dunn: Yes.

Cross-Examination

By Mr. Buckalew:

Q. Who was first notified that Lena Mae Wilkins wanted to talk to somebody?

A. I don't know what time Mr. Pass was, but I previously said, Mr. Buckalew, that when I arrived at the office at 8:00 o'clock in the morning there was a message for me from, I presume, our night clerk stating that Lena Mae wanted to talk to me.

Q. Did you proceed down to Leroy's place with Mr. Pass or did you go by yourself?

A. I went with Mr. A. B. Clark, another agent.

Q. When you arrived at Leroy's place was Mr. Pass already there? [59]

A. Mr. Pass, according to the bartender when I asked him, was already there and Lena Mae was with him at the Anchorage Police Department.

(Testimony of Joseph V. Sachen.)

Q. Then you proceeded from Leroy's place back to the Anchorage Police Department?

A. Yes, sir.

Q. You testified Lena Mae had been drinking?

A. I said she smelled of liquor.

Q. You don't know whether she had been drinking or not? A. I presume she was drinking.

Q. Mr. Sachen, has Lena Mae Wilkins got a pretty vile tongue?

A. Yes, I would say she had.

Q. Did she throw scenes all over the Police Station like a drunk person?

A. No, not at the Police Station. She was a perfect lady, I will have to say.

Q. You have seen Lena Mae on occasions when she wasn't a perfect lady? A. Yes, I have.

Q. That was the same day?

A. Yes, I have.

Q. How long did it take Lena Mae Wilkins to read that statement?

A. I will have to refresh myself on that.

Q. You have the statement, Mr. Sachen?

A. Yes, I have. [60]

Mr. Buckalew: May I see it, your Honor.

(Thereupon, the statement was handed to Mr. Buckalew.)

A. It took her exactly 10 minutes. It was turned over to her at 10:20 and she completed it and signed it at 10:30.

(Testimony of Joseph V. Sachen.)

The Court: How many pages does it consist of, counselor?

Mr. Buckalew: 3 full pages, your Honor, and about $\frac{3}{4}$ of a 4th page.

The Court: Typewritten?

Mr. Buckalew: Yes, sir, double spaced. Does His Honor want to look at it?

The Court: No, I was just interested.

Q. Mr. Pass was present when she read the statement?

A. Yes, Mr. Pass was present while she was being interviewed and the statement was taken.

Q. You didn't take Lena Mae down to Mr. Hartlieb?

A. Yes, that was in the afternoon, sir.

Q. Did you ask her then if the statement was true or——

A. Mr. Fitzgerald took care of that, sir.

Q. You weren't present when she signed the statement? A. Yes, I was.

Q. Do you recall Judge Hartlieb asking Lena Mae Wilkins if she was in fact drunk?

A. That I cannot recall, but I know he asked her if everything in that statement was true and she said yes.

Q. But you can't recall whether or not Judge Hartlieb asked her [61] if she was drunk?

A. I can't recall that because I was on the other side of Mr. Fitzgerald. He might have asked it, but I don't know.

Q. What frame of mind was Lena Mae Wilkins

(Testimony of Joseph V. Sachen.)

in? A. What time of the day, sir?

Mr. Kirkland: Your Honor, I don't know if it is necessary to interpose objections as His Honor can distinguish what is material and what isn't material, but for the purpose of the record probably I should interpose an objection. The frame of mind of the defendant has nothing whatsoever to do with the voluntary——

The Court: It may have some probative value as to whether or not she was drunk or whether she gave the statement voluntary or involuntary, but I ask counsel not to go too far afield.

Q. (By Mr. Buckalew): Say at 9:25?

A. At 9:25 I would say she didn't show any vile temper or anything. She sat there and smoked a cigarette and gave us the story of which is in that statement.

Q. Would you say she was visually upset at 9:25?

A. I wouldn't say she was visually upset at 9:25. She was at 2:30 in the afternoon.

Q. Do you know whether or not Lena Mae Wilkins had anything to drink between 9:25 and 2:30 in the afternoon? [62]

A. She might have. I don't know because I told you, as I said previously, that we took her down in the Flats and let her off 2 blocks from her residence, approximately 2 blocks from her residence and she was back at 1:00 o'clock, like we instructed, at the Police Station.

Q. Did you ever have occasion to observe Lena

(Testimony of Joseph V. Sachen.)

Mae Wilkins on any other occasion other than this occasion we are talking about?

A. No. I have seen Lena Mae Wilkins in my investigations, but I have never known her personally or talked to her previous to the time she gave me the signed statement.

Q. You have never seen Lena Mae Wilkins drunk then?

A. I have never seen her drunk, no.

Q. Did you ask Lena Mae Wilkins to initial certain portions of this statement?

A. Yes, the initials that you see in that statement when she reread it in front of the Assistant United States Attorney Jim Fitzgerald. She made her own corrections and her own initials.

Q. As a matter of fact, Mr. Sachen, did you deliberately make mistakes in the paper and point them out to her and have them initialed?

A. Did I deliberately——

Q. Yes. A. No, I did not. [63]

Q. You didn't do that?

Mr. Kirkland: Your Honor, I object to this line of questioning and I think the court should remonstrate him.

The Court: The objection is sustained as to the last question.

Q. (By Mr. Buckalew): Do you want to look at Lena Mae Wilkin's signature?

A. Sure, I was there when she signed it.

Q. Does that look like a steady signature to you?

A. Well, I have never seen other signatures of

(Testimony of Joseph V. Sachen.)

Lena Mae Wilkins, counselor, so I wouldn't know.

Q. Look at that signature?

A. I am looking at it.

Mr. Kirkland: Your Honor, I am objecting to this.

The Court: Objection sustained. What difference does it make. He testified she was not drunk at the time.

Mr. Buckalew: I want His Honor to look at the signature before he rules on it.

The Court: I will. Are you through, counselor?

Mr. Buckalew: Yes, your Honor.

The Court: Mr. Dunn. Can we proceed right along, counselor, please.

Mr. Dunn: I am doing my best. I am trying to mentally assemble notes I took rather hurriedly here. [64]

Cross-Examination

By Mr. Dunn:

Q. Mr. Sachen, you testified that you smelled liquor on the breath of the defendant Wilkins. How far away from her were you when you smelled the liquor?

A. Oh, I sat at the desk and she sat a foot and a half, two feet from me.

Q. Was she on the other side of the desk?

A. No, she was on my left.

Q. Your heads would be at least two feet apart?

A. I would say probably that.

Q. You smelled it that far away?

(Testimony of Joseph V. Sachen.)

A. Oh, yes.

Q. Now, when you first saw Lena Mae Wilkins was at the Anchorage Police Department, isn't it?

A. Yes, sir.

Q. Was she and Officer Pass alone?

A. She and Officer Pass and I think someone else was there, but I do not remember, sir. It was in the detective room.

Q. What was her general appearance at that time? Was she neatly dressed?

A. I wouldn't say she was spick and span. I would say she was——

The Court: Disheveled? [65]

A. Disheveled. Thank you, Judge.

Q. But with a little bit of aid the word disheveled did come into your mind with respect to her appearance?

A. I have never seen Lena Mae before this time to speak of and I really don't know—or seen her groomed or not groomed. I will say she was, I presume she was on an all-night tear. I just presume that because she called my office much before I came to work which was 8:00 o'clock in the morning, at 7:30 rather.

Q. I want to be certain I understood your statement correctly. Did you say that you presumed that she had been on an all-night tear?

A. I said I don't know. I said I don't know if she had been or not.

Q. Did you say you presumed she had?

(Testimony of Joseph V. Sachen.)

A. She might have been for all I know.

Q. I am not asking you whether she was or was not. I am asking you what you said just now. Did you say that when you first saw her you presumed she had been on an all-night tear?

A. She had been drinking most of the night I presume. I presume she had most of the night—rather I don't know, sir.

Q. I hate to keep asking this question, but I am going to until it is answered. When you first saw—did you testify just a minute ago that when you first saw Lena Mae you presumed that she had been on an all-night tear? [66]

A. I presume—that is what it looked like to me, yes, sir.

Q. Do you think she hadn't been to bed all night? A. That I don't know.

Q. Were her eyes puffy?

A. I can't remember.

Q. Did she seem particularly nervous?

A. No, not necessarily.

Q. Did you ask her before you took a statement from her what she had been doing all night?

A. No, I didn't, sir.

Q. Did you ask her how much she had had to drink?

A. No, I didn't. At that time she was my witness and I didn't ask her.

Q. Whose pen did Lena Mae use to sign that statement?

(Testimony of Joseph V. Sachen.)

A. I don't remember. I think it was my own, but I don't remember, sir.

Q. Did you have a pretty good pen?

A. Parker 51 I had. I haven't got it any more.

Q. How long do you think it would take you to read that statement?

Mr. Kirkland: I object to this, your Honor.

The Court: Objection sustained.

Mr. Kirkland: It has nothing to do with whether the witness was too——

The Court: The court sustained your objection; let's not waste any more time. [67]

A. How long would it take me?

The Court: Don't answer the question.

Mr. Dunn: That objection was sustained, Mr. Sachen.

A. Thank you.

Q. Now, you testified that you did not hear Judge Hartlieb, the Commissioner, ask the defendant Wilkins whether or not she was drunk?

A. No, I didn't hear that, sir.

Q. Now, how far were you from Judge Hartlieb during the proceedings that took place with respect to the defendant Wilkins at that time?

A. Oh, I would say 3½ to 4½ feet.

Q. Then you would be in a position, in all probability, to have heard everything that Judge Hartlieb said, wouldn't you?

A. Well, there was Judge Hartlieb. There was Mr. Fitzgerald who was talking to Judge Hartlieb and then myself.

(Testimony of Joseph V. Sachen.)

Q. Well, you were pretty interested in what was going on there, is that true?

A. Well, yes I was, but as I testified, Mr. Fitzgerald was handling that phase of it right there, sir.

Q. You felt that your presence there was necessary?

A. Yes.

Mr. Kirkland: Now, your Honor, I object to any further questions on this. I will provide Mr. Hartlieb and he can ask him on cross-examination.

The Court: I think that counsel has a right to determine what went on at that particular trial since this witness has testified that he did not recall Judge Hartlieb did ask her such a question. Therefore, the objection will be overruled.

Q. Were you paying pretty close attention to what went on down there?

A. Well, I was there. I know that Mr. Fitzgerald was handling the case or handling that phase of it. I was there and listening to it. I didn't get all of it or I don't remember all of it.

Q. Well, let me repeat the question. Now, were you paying pretty close attention to what took place down there?

A. I was paying attention, but not too close; not as close as I would be if I were bringing her in front of the U. S. Commissioner, sir.

Mr. Kirkland: Your Honor, may I ask what counsel are doing? Both of them are cross-examining the witness. One goes through and one gets together—we will be here way after New Year's on this case.

(Testimony of Joseph V. Sachen.)

The Court: Objection sustained.

Mr. Buckalew: I didn't hear Mr. Kirkland's statement.

The Court: Never mind, counselor, it wouldn't help you much, I am sure.

Q. Did Lena Mae Wilkins throughout these proceedings leading up to her giving you a written statement seem pretty anxious [69] for you take some action?

Mr. Kirkland: Objection. Immaterial.

The Court: It may have some tendency to show her intent or motive, therefore, the objection will be overruled.

Mr. Kirkland: Your Honor, I don't believe the motive would give any assistance to the court in this matter.

The Court: Technically speaking I agree with you. However, the objection is overruled. It is before the court only. Will you answer the question.

A. I would say she was quite anxious.

Q. You would say she was what?

A. Quite anxious to give me a signed statement. Wasn't that the question?

Q. Well, I don't know whether it was that or whether—did she—I think the question is: Did she seem pretty anxious for you to take some action towards putting Yokely in jail?

A. She was anxious to give me a signed statement, sir.

Q. Did she—would it be inappropriate for you to state that from observing Lena Mae Wilkins at

(Testimony of Joseph V. Sachen.)

this time the old saying came into your mind of
“Hell hath no fury like a woman scorned”?

Mr. Kirkland: Objection. Immaterial.

The Court: Objection sustained.

Mr. Kirkland: Counsel has proven——

The Court: Mr. Kirkland, when the court has ruled in [70] your favor is there any reason why you continue to talk?

Mr. Kirkland: I apologize, your Honor.

The Court: Very well.

Q. Well, did you get the impression from observing Lena Mae that she was an angry woman determined, evidently set upon the course of revenge?

Mr. Kirkland: Object to it again, your Honor.

Mr. Dunn: Before you rule——

The Court: Objection overruled. You may answer.

A. I know she was angry. She seemed like she was angry with Yokely, yes.

Q. Did she seem appreciably aggravated and upset?

A. No, I wouldn't say appreciable angry or upset. She just gave me the signed statement and I told her that I wouldn't be able to do anything about it until I consulted the United States Attorney.

Q. You would say, I take it, therefore, she was appreciably aggravated and not appreciably upset?

A. I can't say that. I didn't know Lena Mae that well, to be truthful.

(Testimony of Joseph V. Sachen.)

Q. I want you to be truthful.

A. To be truthful I couldn't say how angry or upset she was. You see I had never met the girl before this time.

Q. Well, you feel you are capable, do you not, of simply looking at a stranger and observing abnormal behavior in that [71] individual?

A. Oh, I think I am, but I don't think I am an expert at it.

Q. But what?

A. I don't think I am an expert at it.

Q. Do you mean that you are equally inexpert at judging whether or not a person is drunk?

A. I am not an expert to know if a person is drunk or not.

Q. Is it your present testimony—I might be mistaken—when you previously testified Lena Mae was not drunk?

A. I previously testified that she was not drunk, but she had been drinking.

Q. Are you now testifying that possibly you were mistaken when you previously said she was not drunk?

A. I will say she wasn't drunk. I will still say she wasn't drunk.

Q. Do you also say that that statement of yours—now, I want your fair appraisal of it—is at best an inexpert opinion? A. Well——

Mr. Kirkland: Your Honor, that calls for a conclusion. It is argumentative.

Mr. Dunn: I want to know what this witness thinks of his own testimony, your Honor.

(Testimony of Joseph V. Sachen.)

The Court: I realize that, but, Mr. Kirkland, this witness is an expert in the sense he has had a lot of experience and it is evidenced by virtue of his calling. [72]

A. I still maintain she was not drunk.

Q. I know you still maintain that and I assume you are going to continue to maintain it, but I would very much appreciate your answering this question if you feel you can fairly do so and the question is: In evaluating your own testimony to the effect that Lena Mae Wilkins was not drunk, are you willing to say that that testimony is at best an inexperienced opinion?

Mr. Kirkland: Object to the question, your Honor, as being immaterial. The witness has testified as to what he saw and as to whether or not he is an expert. How could he appraise it? I assume only an M.D. could be an expert in a matter like this.

Mr. Dunn: Your Honor, it is the same objection that has already been overruled.

The Court: You may answer the question. You know better in your own mind, Mr. Sachen, whether or not you are able to judge a person as to their sobriety.

A. I still maintain that Lena Mae Wilkins was not drunk.

Q. Would you consider that answer evasive

A. No, I wouldn't, sir. I do it to the best of my knowledge.

Q. Just one further question. As an agent of the Federal Bureau of Investigation if Lena Mae

(Testimony of Joseph V. Sachen.)

Wilkins was in fact drunk when that statement was given would you want it to be introduced into [73] evidence?

A. If Lena Mae Wilkins was drunk and I thought she was drunk and as an agent of the Federal Bureau of Investigation I would say she was drunk.

Q. Will you read that answer back to me, please.

(Thereupon, the reporter read the last answer.)

Q. I believe that, Mr. Sachen, but it doesn't answer my question.

The Court: I think it has been answered sufficiently to satisfy the court, Mr. Dunn.

Mr. Dunn: I beg your pardon.

The Court: It may not satisfy your mind, but it satisfies the court's mind. The only thing we are concerned about at this time is not his relationship with the F.B.I., but his testimony as to whether or not this defendant was drunk at that time and he has testified she was not. You may call your next witness.

Mr. Buckalew: Your Honor, could I ask the witness one more question?

The Court: No, the court feels you had a good chance, both yourself as well as through your co-counsel, therefore, your motion will be denied. You may call your next witness.

(Thereupon, the witness was excused and left the stand.)

Mr. Kirkland: I would like to call Mr. Jim Fitzgerald.

JAMES FITZGERALD

called as a witness for and on behalf of the Government, and being [74] first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir?

A. James Fitzgerald.

Q. And you are Assistant United States Attorney?

A. That is correct.

Q. Mr. Fitzgerald, on or about September 7 did you have occasion to see the defendant Lena Mae Wilkins in your office?

A. I don't know the exact date, but it was about that time I saw her on one occasion in my office in connection with the statement which she had given.

Q. Will you tell the court the condition of the defendant, that is, as to intoxication; whether or not she was intoxicated?

A. Well, she was not. If she was intoxicated—I will say this—that I didn't notice any symptoms or any indications whatsoever.

Q. Was she able to talk clearly?

A. She talked clearly enough when I saw her.

Q. And was she able to walk?

A. From what I saw of her she was able to walk without any indication of difficulty.

Q. Did you threaten her?

(Testimony of James Fitzgerald.)

A. No, I didn't take the statement. I asked her to read it again and to make any corrections, but as far as—— [75]

Q. And did she read the statement?

A. She read it right there.

Q. Did she make any corrections?

A. To the best of my recollection she did make several corrections in it.

Q. And it is your testimony that she was not drunk?

A. Not in any way that I could distinguish.

Mr. Kirkland: No further questions.

The Court: You may cross-examine, Mr. Buckalew.

Cross-Examination

By Mr. Buckalew:

Q. How long did you have occasion—I mean, how long did this last, this observation?

A. Oh, I'd say probably about 15 or 20 minutes in our office and probably 10 minutes down at the Commissioner's Court.

Q. Were you sitting at your desk?

A. Yes.

Q. Where was Lena Mae?

A. She was across the desk from me and I believe I gave her a pen at one time to make some initials and that was the closest I got to her.

Q. Did you smell alcohol on her breath? [76]

A. I didn't detect any odor of alcohol.

Q. Did you have occasion to observe Lena Mae

(Testimony of James Fitzgerald.)

Wilkins on a prior occasion when she testified in this court before the Honorable Judge Folta?

A. No, I didn't, but I have heard about it.

Q. Was Lena Mae Wilkins pretty violent the day you saw her as to her attitude toward Mr. Yokely?

A. No, she didn't appear to be unduly aggravated at him. She was willing to give the statement and I was surprised—I had heard so much about her and I was surprised at her appearance at that time. I mean, she seemed to be fairly lady like when I talked to her.

Q. You heard Mr. Sachen's testimony?

A. Yes, I did.

Q. Did you hear Mr. Sachen testify that she looked like she had been out all night?

A. When I saw her I didn't get that impression. Of course, I didn't see her at 9:00 o'clock in the morning. I saw her in the afternoon.

Q. About what time?

A. To the best of my recollection it was in the afternoon, oh, sometime after lunch—fairly early in the afternoon.

Q. Do you recall whether or not she was dressed in a dress or had slacks on?

A. I am not sure what she wore. I couldn't tell you, Mr. Buckalew. [77] It is my impression she had a dress on, but I may be wrong in that.

Q. Did you observe her eyes?

A. My observation was a general observation. I, at that time, was interested in examining her as to

(Testimony of James Fitzgerald.)

whether we should file a violation under the Mann Act and the reason I wanted to see her was because I wanted to satisfy myself as to her condition and as to what she was going to testify to and my general impression of her appearance was that she—I will say this, I had no idea or apparently she wasn't under the influence of either narcotics or alcohol.

Q. Did you call in the narcotics officer?

A. No, I am making that on my own estimate of what she was at that time.

Q. Did you ask Lena Mae if she took dope?

A. No, I did not.

Mr. Kirkland: Object to this line of questioning, your Honor.

The Court: Well, it may be relevant if she was under the influence of dope at that time.

Mr. Kirkland: The objection was as to alcohol. It doesn't make too much difference, but I hate—it is so time-consuming.

Mr. Buckalew: I didn't hear what Mr. Kirkland said.

The Court: Well, the objection is overrruled. You may [78] proceed.

Q. (By Mr. Buckalew): Did you ask her if she had been drinking? A. No, I did not.

Q. You went with her down to the Commissioner's Court? A. Yes.

Q. You got pretty close to her in Commissioner's Court? A. Yes.

(Testimony of James Fitzgerald.)

Q. You didn't smell alcohol on her in Commissioner's Court? A. No, I didn't.

Q. Did you hear Judge Hartlieb ask her if she had been drinking?

A. No, I don't believe he asked that question. If he did I don't recall it, but it is my impression he did not ask that question. He made an examination as to whether she had signed the statement or not and whether she had read it. I mean, he took some trouble to establish that.

Q. Would you say that Lena Mae Wilkins had the shakes that morning?

A. If she did I didn't detect it.

Q. She spoke to you then, in your office, in an even voice?

A. She surprised me because I had heard so many stories about it and the impression she gave me was contrary to what I had heard.

Q. Did you see her later on that day?

A. I don't believe I saw her after she left the Commissioner's [79] Court.

Q. Do you know whether or not she had on high heels? A. No, Mr. Buckalew, I don't.

Q. Did you observe her walking?

A. I believe I did.

Q. But you don't know whether she had on high heels? A. No, I don't.

Q. You don't know whether she had on a dress or slacks?

A. No. I have the impression she had on a dress, but I may be wrong.

(Testimony of James Fitzgerald.)

Q. Do you think you could be wrong as to her state of sobriety?

A. No, because if there had been anything out of the ordinary, Mr. Buckalew, I think I would have noted it, but there wasn't anything out of the ordinary that I could see.

Q. How close did you get to this woman in Commissioner's Court?

A. I got fairly close to her.

Q. 2 feet? A. Within 2 feet.

Q. Were you facing her, face to face?

A. When she was talking to the Commissioner I was standing almost beside her.

Q. Did she talk and look at you when she said anything?

A. I would say I was standing beside her and she was talking to the Commissioner.

Q. And she never did face you and talk to you within the 2 feet? [80]

A. She may have. I am not sure.

Q. When she was in the Commissioner's Court you didn't observe anything unusual about her demeanor or appearance? A. Nothing at all.

Mr. Buckalew: Your witness, Mr. Dunn.

The Court: Mr. Dunn, do you have any questions?

Mr. Dunn: Just a couple, your Honor.

(Testimony of James Fitzgerald.)

Cross-Examination

By Mr. Dunn:

Q. Did you have occasion to talk to Lena Mae Wilkins just prior to her appearance before the Grand Jury recently? A. Yes, I did.

Q. At that time did she make any statement to you concerning her state of soberness at the time this statement was given?

A. Yes, she did. She said she was drunk.

Q. She said she was drunk? A. Yes.

Q. Did you reply to that statement?

A. Yes.

Q. What did you say?

A. I told her if there was any question about it I would have to say she wasn't drunk. [81]

Q. Did you say you would go before the Grand Jury and swear she was not?

A. I said if there was any question about it I would have to say she wasn't drunk because that was my impression.

Q. Did you tell her you would make that statement to the Grand Jury?

A. I don't recall that.

Mr. Kirkland: Your Honor, I object to this line. It is immaterial.

The Court: Objection sustained.

Q. (By Mr. Dunn): Well, your testimony then is, if I understand it correctly, that at the time you talked to Lena Mae Wilkins before her appear-

(Testimony of James Fitzgerald.)

ance before the Grand Jury you told her that you would say that she was not drunk?

A. I told her first of all I didn't think she was drunk. I told her if there was any question about her I would have to say she was not drunk.

Q. Now, is your present testimony to this effect, tell me whether or not I am stating it fairly, that if she was intoxicated at that time you didn't notice any indication of it?

A. That is essentially my position.

Mr. Dunn: No further questions.

The Court: Very well. You may step down.

(Thereupon, the witness was excused and left the stand.) [82]

The Court: You may call Mr. Hartlieb for one question only as to whether or not he asked the defendant whether she was drunk. Anything beyond that point would be cumulative and time-consuming and of no probative value.

GORDON L. HARTLIEB

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please?

A. Gordon Hartlieb.

Q. And you are United States Commissioner for the Anchorage precinct?

(Testimony of Gordon L. Hartlieb.)

A. That is true, sir.

Q. And you were serving in that capacity on September 7, 1954? A. Yes, sir.

Q. And while acting as United States Commissioner was the defendant Lena Mae Wilkins brought before your court to sign an affidavit—or, to swear to the truth of a statement?

A. Yes, sir.

Q. Did you ask the defendant, or the witness at that time, Lena Mae Wilkins, if she was drunk?

A. No, I did not.

Mr. Kirkland: Thank you, sir. [83]

The Court: Any cross-examination?

Cross-Examination

By Mr. Buckalew:

Q. Do you recall, Judge Hartlieb, if you asked her anything?

A. Do you want me to now testify as to what I asked her? Is that what you are asking me?

The Court: No, he asked whether or not you asked her anything.

A. I asked her if it was her voluntary statement. I asked her if she swore to it. I asked her if they were her initials. I asked her if it was her signature.

Q. Did she sign the statement in front of you?

A. No, she didn't, to the best of my knowledge. She had signed it and I pointed to the signature and asked her if it was her signature and if she had signed it.

(Testimony of Gordon L. Hartlieb.)

Q. You didn't see her sign the statement?

A. No, sir, I can't testify that I did.

Q. Did you smell liquor on her breath, Judge Hartlieb?

Mr. Kirkland: Your Honor, am I going to be allowed to ask these questions?

The Court: If you don't object the court can't rule.

Mr. Kirkland: I thought counsel understood. I was [84] beginning to get confused.

The Court: Well, the court is looking to you to object, counselor. I am not conducting the trial.

A. Do I answer the question?

Mr. Plummer: I object at this time. The witness was called for one purpose only.

Mr. Kirkland: I thought I had objected.

The Court: Objection sustained.

Mr. Buckalew: Nobody objected.

Mr. Dunn: Then, Your Honor, if Mr. Kirkland called the witness for just one purpose only we are willing to make Mr. Hartlieb our witness in order to examine him fully.

The Court: You may do so.

Mr. Plummer: The ruling is, as I understand it, the one question only was made by the court, not by the Government.

The Court: That is right. You may step down, Mr. Hartlieb. Thank you for coming.

(Thereupon, the witness was excused and left the stand.)

The Court: Do you have any more witnesses you want to put on?

Mr. Kirkland: I have some more. This is a hearing for the convenience of the court. I have the City Magistrate, Mr. George McLaughlin.

The Court: Well, I think he should come forward because we don't have corroboration from his office. [85]

GEORGE M. McLAUGHLIN

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir?

A. George M. McLaughlin.

Q. And you are an attorney at law?

A. I am.

Q. And you are also the City Magistrate for the City of Anchorage? A. I am.

Q. And you were acting in that capacity during the month of September? A. I was.

Q. Mr. McLaughlin, did you have occasion to see the defendant in this case, Lena Mae Wilkins, in the company of Officer Pass, I believe, and Special Agent Sachen of the F. B. I.?

A. If I may expedite the matter—the only time that Mr. Sachen and Detective Pass were ever in my office is when they were accompanied there by a negress. I cannot say what date that was.

(Testimony of George M. McLaughlin.)

Q. And will you describe the appearance, that is, to intoxication of the defendant?

A. It is my distinct impression that the negress who was [86] accompanied by Detective Pass and Mr. Sachen was sober.

Q. Did the defendant swear to a complaint in your court?

A. Yes, the defendant did swear to a complaint in my court.

Q. What was that complaint, sir?

A. My recollection is that it was—I do not even remember the name of the man—it was a complaint for maintaining or pimping. It was against a pimp is my distinct recollection.

Q. You don't remember whether or not the defendant was there?

A. I cannot say who it was against, the person it was against.

Mr. Buckalew: Your Honor, I would like to ask that Judge McLaughlin's statement, "that it was against a pimp," that is, what he remembers about it, be stricken.

The Court: It may be stricken. It is before the court. It doesn't influence the jury.

Mr. Buckalew: I want to point that out to His Honor, because I have been in Judge McLaughlin's court.

The Court: Any more questions, counselor?

Q. Do you allow anyone to sign a complaint in your court in front of you that are intoxicated, drunk?

A. Never.

(Testimony of George M. McLaughlin.)

Mr. Kirkland: Thank you, sir.

The Court: You may cross-examine, Mr. Buckalew. [87]

Cross-Examination

By Mr. Dunn:

Q. Mr. McLaughlin, did you notice Mr. Kirkland's switching in the course of his questioning from your answers, "that there was a Negress before me," to his saying the defendant? Did you catch that? A. Yes, I heard it.

Q. Well, do you know who this Negress was?

A. I cannot say. The lady is familiar to me, but I cannot say that she was the lady specifically who was there on that day.

Q. And this sober person who came before you might have been any Negress in the Anchorage area, is that true?

A. That is quite true, but the only Negress who ever complained or signed a complaint in my office at any time in all the time that I have been Magistrate was a Negress who was accompanied by Mr. Sachen and accompanied by Detective Pass. Within my recollection that is the first and the last time that Mr. Sachen was in my office.

Q. Now, you stated, did you not—I want to see if these were your words—that it was your impression that this Negress, whoever she was, was sober?

A. That is so.

Q. Now, did you ever talk to me about the sobriety of this individual?

(Testimony of George M. McLaughlin.)

A. Yes, I did by phone and I think subsequently thereafter. [88]

Q. Do you remember what you told me then?

A. Within my recollection I told you that I would have to say she was sober; that she was not drunk.

Q. Let me ask you if you said this—see if this refreshes your recollection—did you tell me, “that if she was drunk you didn’t remember it”?

A. No, I may have used the expression indicating she was sober.

Q. You don’t remember saying that to me if you did say it?

A. I may well have said—what was the phrase that you suggested?

Q. I asked whether or not you can now remember saying to me, “that if this Negress was drunk you don’t remember it”?

A. I may well have said, “if she was drunk.” I certainly don’t remember it with the accent on the “don’t remember it.” It was my intention to indicate to you that she was sober.

Q. Do you think you might have made that statement?

A. Made the statement with a stress on the fact that I didn’t or don’t remember it?

Q. Could you have made the statement with the stress on, “I certainly”?

A. I question whether I would have. I can’t re-

(Testimony of George M. McLaughlin.)

call it, Mr. Dunn, but it was my intention, certainly, at that time to indicate she was sober.

Q. This Negress? A. Yes. [89]

Mr. Dunn: Thank you.

The Court: Mr. Buckalew.

Cross-Examination

By Mr. Buckalew:

Q. Judge McLaughlin, do you recall who signed that complaint?

A. My recollection is that it was the Negress who accompanied these—either—both of the—Sachen and Pass. I couldn't be sure. Detective Pass may well have signed it. I haven't checked my records to determine.

Q. Did you interrogate this Negress about the facts of the complaint?

A. My recollection is that I did.

Q. How long did you interrogate her?

A. My recollection is it was about a minimum of 5 minutes.

Q. You talked to her for 5 minutes but you are not sure you could identify this particular Negress at all? A. That is right.

Q. That was in your office down at the court-house?

A. No, that was in my office in the First National Bank building.

Q. Do you know whether or not this Negress was seated across from your desk? [90]

(Testimony of George M. McLaughlin.)

A. It is my distinct recollection she was seated across from my desk, Mr. Buckalew.

Q. You didn't observe anything unusual about this particular woman?

A. Nothing that I can recall.

Q. Do you recall her telling you that she wanted to get somebody by the name of Yokely in jail as quick as possible?

Mr. Kirkland: Object to the question. Immaterial.

The Court: The only materiality it could have is whether or not this may have probative value as to her sobriety.

Mr. Buckalew: Your Honor, I don't want to say this, but His Honor——

The Court: The objection is overruled. You may answer.

Mr. Buckalew: I was going to say——

The Court: Objection overruled. Go ahead. There is no use in making a speech after the court has ruled in your favor.

A. Mr. Buckalew, I can't recall her saying specifically it was a Mr. Yokely. I can remember that she was quite anxious to have this warrant issued against some person.

Q. Did you say you were going to get that person in jail right now? A. I can't recall.

Mr. Kirkland: Your Honor, I object to that. [91]

The Court: Objection sustained.

(Testimony of George M. McLaughlin.)

Q. But she was anxious to get this person in jail?

The Court: He so testified, counselor.

A. It is my impression the lady was quite fearful of one or two things, I recall.

Q. She was visually upset, wasn't she?

A. Yes, you would call it visually upset if vehement is being visually upset. She was visually upset.

Q. Now, if she was vehement what did you observe of her demeanor that made you reach the conclusion she was vehement?

A. Vehement in the——

Mr. Kirkland: Object to the question.

The Court: Objection sustained. It hasn't anything to do with whether she was drunk or sober.

Mr. Buckalew: It might, Your Honor.

The Court: Objection sustained.

Q. Was she shaky?

A. My recollection is no. As I recall, Mr. Buckalew, there was nothing that indicated to me she was drunk or under the influence.

Q. Did you observe her walk, Judge?

A. Vaguely, I must have observed her walk because I was present—it is not a large room and I would have seen her enter and I would have seen her leave.

Q. It didn't occur to you when you brought that woman in there, [92] "here is another drunk I am going to throw in jail," did it? Did that occur to you?

A. No. As a matter of fact, my recollection is

(Testimony of George M. McLaughlin.)

that the lady was under arrest. My recollection is that she was a complaining witness or at least to provide the testimony on which basis of a warrant would issue.

Q. Did you think it unusual they should bring a complainant in there?

Mr. Kirkland: Objection.

The Court: Objection sustained.

Mr. Buckalew: Your Honor, here is the problem Mr. Dunn and I both have: These witnesses can only remember certain things. I'd say all the witnesses are hostile and I am not going to ask any more questions.

The Court: Very well. The court has to rule upon the questions of admissibility of evidence as to the relevancy, the competency and materiality and the court rules rather readily, as you noticed, from time to time because it should be very obvious that it is not relevant, material or competent.

Mr. Buckalew: There is only one thing I want to point out to the court. We are having a most difficult time finding out anything.

The Court: Well, counselor, you have the right to call your own witnesses.

Mr. Buckalew: We are going to do that, Your Honor. [93]

The Court: Very well. You may step down. Thanks for coming.

(Thereupon, the witness was excused and left the stand.)

The Court: Does the Government rest as to this portion of the proof?

Mr. Kirkland: If the court is desirous——

The Court: No, the court is not.

Mr. Kirkland: The Government rests on this point then.

The Court: What is your pleasure—would you like a recess? The court reporter must change paper, therefore, the court will stand in recess for 10 minutes.

(Whereupon, at 4:05 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had:)

The Court: Mr. Buckalew, you may call your first witness.

Mr. Dunn: Call Mr. Richard Burge.

The Court: Mr. Burge may come forward and be sworn.

RICHARD W. BURGE

called as a witness for and on behalf of the defendants, and, being first duly sworn, testifies as follows:

The Court: Now, I point out to you the court will not permit both counsel to—that is, one to have direct and the other [94] have a cross on this.

Mr. Dunn: All right, Your Honor.

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Richard W. Burge.

(Testimony of Richard W. Burge.)

Q. Mr. Burge, do you know the defendant, Lena Mae Wilkins? A. Yes, I do.

Q. How long have you known her?

A. Approximately 2 years, year and half to 2 years.

Q. Have you ever seen the defendant—by the defendant I am referring only to the defendant Wilkins—have you ever seen the defendant drunk?

A. Yes, I would consider her drunk.

Mr. Kirkland: Object unless it is preliminary to the certain day.

The Court: Is it preliminary?

Mr. Dunn: It is preliminary, Your Honor.

The Court: Go ahead. Objection overruled.

Q. Well, now throughout this 2-year period have you observed her in both a sober and drunk condition? A. I have, Yes,

Q. And have you observed her frequently enough that you feel that you can tell when she is sober and when she is drunk?

A. I have by her actions, yes.

Q. Well, now there has been appreciable testimony elicited here, Mr. Burge, concerning the time at which a statement was taken [95] from the defendant Wilkins, a statement given to an officer Pass and F.B.I. Agent, Mr. Sachen, and testimony to the effect that—that statement was sworn to before the United States Commissioner. Now, did you see the defendant Wilkins that same day? Do you know?

(Testimony of Richard W. Burge.)

A. Well, I didn't read the statement and I——

Mr. Plummer: Object to the question. He has not specified what day it was yet.

Mr. Dunn: I don't think the witness knows the date, Your Honor. That is the reason I asked the witness if he saw the defendant Wilkins on the same day the defendant allegedly gave this statement. I am trying to tie it to that day although not a day.

Mr. Plummer: How can you establish that if he wasn't present when the statement was given?

Mr. Dunn: I can't. The only way I can establish it is by asking him questions.

The Court: The objection is overruled. This is before the court and we are only trying to get at the facts as quick as possible.

A. Well, Mr. Dunn, I will answer your question in this manner. The day that Lena Mae was in the Commissioner's Office, the day that Yokely was arrested by Mr. Sachen and Mr Pass, I was present in the Commissioner's Office and I saw Lena Mae in the Commissioner's Office. I was present in East Chester [96] when they put Yokely in the car and brought him to town. Now, the exact date and exact time I am not aware of to the extent that I would swear to the time.

Q. But you did—excuse me.

A. But I do know that it was the day that the Commissioner swore to some statement and asked her if she know what was in the Statement and he had her raise her right hand, asked her if she knew what was in the statement and if it was true and

(Testimony of Richard W. Burge.)

some things to that effect, but I couldn't hear it all because I was tending to some other business in the Commissioner's office.

Q. Can you answer this question. Did you see the defendant Wilkins on the day that the defendant Yokely was arrested? A. Yes, sir, I did.

Q. Well, now where did you first see the defendant Wilkins that day?

A. Well, I met her and Officer Pass and Agent Sachen and United States Attorney Fitzgerald coming out of the United States Attorney's office.

Q. And did you speak to the defendant?

A. Well, Mr. Pass came out first and I spoke to him and he spoke to me. She came out second and she said to me, "Hello, Mr. Burge," and I spoke, I said, "Hello, Maggie."

Q. She said, "Hello, Mr. Burge"?

A. Yes, she did. [97]

Q. Do you attribute any significance to her greeting, "Hello, Mr. Burge"? A. Yes, I do.

Q. What significance?

A. Well, on several occasions——

Mr. Kirkland: Object to it, Your Honor, as to what he attributes.

The Court: Objection sustained.

Q. Well, over this period of 2 years that you have known Lena Mae Wilkins have you gotten to know her well enough to use first names?

A. Well, she calls me Richard, but generally when I am in a bar and if she has been drinking or having some misunderstanding with different ones

(Testimony of Richard W. Burge.)

in the bar and I speak to her she would address me formally then "Mr. Burge."

Q. Is this or is this not true that when the defendant Wilkins is drinking rather heavily she calls you Mr. Burge and otherwise she calls you Richard?

A. That is a fact, yes, sir.

Q. And she called you Mr. Burge when she stepped out of the District Attorney's office?

A. Yes, she did.

Q. Now, when you first saw her there, that is, stepping out of the District Attorney's office—

Mr. Plummer: I object to this line of questioning. He [98] can ask the witness to state as to her sobriety, intoxication. What he calls her on March 3, or April 2 has no probative value whatever.

The Court: How does it tend to prove the defendant was drunk or sober?

Mr. Dunn: By the testimony of the witness here, Your Honor. So far as I see it the witness has testified that when the defendant is drunk she calls him Mr. Burge and when she is sober she calls him Richard and on this particular day she called him Mr. Burge. It is merely one bit of the evidence toward drunkenness. I am going on. It is not all I have.

Mr. Plummer: My contention is, Your Honor, if he wants to know what this witness thinks was the condition of the defendant on that day as to sobriety he can ask this witness.

Mr. Dunn: I am going to ask him.

The Court: I feel the first question was more or

(Testimony of Richard W. Burge.)

less preliminary, but the objection will be sustained as to any further questions along the same line so finely drawn and it doesn't have much probative value, as you may well understand, Mr. Dunn.

Q. (By Mr. Dunn): Where were you going when you saw the defendant Wilkins coming out of the District Attorney's office?

The Court: Mr. Dunn, what relevancy does that have?

Mr. Dunn: Your Honor, it is a preliminary question. What I am trying to bring out is this: He was going a certain [99] place and in the course of that he walked behind her and then I am going to ask what he saw when he walked behind.

The Court: Would you please get to the point. I am not trying to shut you off, but it seems like you are talking the long way around.

Q. Did you follow the defendant Wilkins down the hall in the Federal Building?

A. Yes, I did.

Q. What did you observe with respect to the way in which she walked?

A. Well, I would say it wasn't her usual actions to the extent that in the course of time of knowing the defendant her actions are quite a bit different when she is drinking.

The Court: May I interrupt you, please. Does it make any difference if she is—how she walked?

A. Well, generally when she is drinking she is mad.

The Court: Well, was she mad on this occasion?

(Testimony of Richard W. Burge.)

A. Yes, sir, she was and I didn't realize it as much as I did when I saw her later.

The Court: How do you know she was mad on this occasion?

A. Because of the vile and abusive language she was using in front of the officer. The officer tried to shut her up and she wouldn't do it.

The Court: Was that in the hall here?

A. No, sir, this was about 30 minutes later. [100]

The Court: This is after that?

A. Yes, sir.

The Court: I see. Thank you. You may proceed, counselor.

Q. (By Mr. Dunn.): Now, did you see the defendant later after observing her in the Commissioner's office?

A. Not later than 30 minutes after I saw her in the Commissioner's office.

Q. And how was she acting then?

A. Quite abusive, I would say.

Q. Was she acting in a drunken or sober manner?

A. Well, she was talking quite a bit. She was loud. She was using quite a bit of profanity and Mr. Pass asked her to keep quiet and his authority had no effect on her. She just kept right on talking and cussing.

Q. Now, in your opinion, Mr. Burge, from observing the defendant throughout your acquaintance with her, the 2 years, when you saw her on this particular day was she drunk or sober?

A. Well, in my honest opinion I think she was

(Testimony of Richard W. Burge.)

under the influence of something. I couldn't say. I didn't smell whiskey on her because I wasn't exactly close to her, but it was something. She wasn't normal.

Q. Well, would you say her appearance was abnormal?
A. It was, yes. [101]

Q. That abnormality was caused by drink? Was she drunk or sober, assuming it was caused by drink?
A. She was drunk.

Q. Would you say she was obviously drunk?

A. From her actions, yes, sir. A person would have to be drunk to disrespect people that use the disrespect she was using. I would say she would have to be under the influence.

Q. Were there a number of officers around the defendant down in the Flats after she left the Commissioner's office?

A. Well, at one time, yes, sir. To—if I may make myself explicit.

The Court: You may.

A. I drove down to East Chester Flats across the street from Yokely's home where she had been residing and I saw Officer Pass' car, City car there. I saw Mr. Sachen standing in the doorway so I walked over and I said to him, "Are you arresting Yokely?" He said, "Yes," and I said, "Well, my interest is the bond part of it. Could you tell me about what the bond is going to be?" and he said, "Well, I don't know. I couldn't tell you the charge. I can tell no one the charge, but I have 2 charges and I think Mr. Pass has a couple of charges against him. The bond will be pretty high." And I said,

(Testimony of Richard W. Burge.)

“Well, I will see about securing a bond for him.” At this time there was only the 2 officers there and I didn’t get in the house, but I could hear Mr. Pass telling [102] Yokely to hurry up and come out and Mickey was in the hallway there someplace talking quite loud. I refer to Mrs. Wilkins as Mickey. I stood there and talked with Officer Sachen for awhile about the case, the bonding part of it, and Yokely came out and Officer Pass was behind him, I think, and then Mickey came out and Officer Sachen walked over to the car and opened the back door—in the meantime they were trying to get Yokely away from the house and he was telling them he didn’t want to leave unless they carried her away and not leave her there with his wife because his wife was sick and she was loud and talking and drinking and she might aggravate and cause his wife to get in trouble by being nervous. Officer Sachen told him as far as he was concerned that was her home and she said she had been living there, it was her castle or something to that effect. So Mrs. Wilkins at this time was being pretty vulgar to the extent of being abusive, using profane language and she was talking directly to Yokely about the condition she was in or something to that extent and he was trying to put her out or something, so she walked up behind him—he was behind Officer Sachen and Officer Sachen was headed to the car—she was being abusive to the extent she was calling him foul names and he turned around and hit her.

(Testimony of Richard W. Burge.)

The Court: When you say "he"—

A. Yokely. [103]

The Court: I see. Thank you.

A. So Officer Sachen caught him from the rear by the arm and Officer Pass said, "Well, there is another charge against you." I was standing near the officer and I said, "Sure is, but it was aggravated assault." I said, "If she talked to you that way you would probably hit her yourself." So I think Officer Pass at this time decided to call some City officers down to move her, or something. So they stood around there awhile, waited until the City car came down with 2 uniformed officers and a plainclothesman—I think the man was Mr. Hallowfield, I think that is the detective's name—anyway, the detective talked with Mr. Pass for a few minutes. Mr. Sachen and Mr. Pass put Yokely in the car and left. The 2 uniformed officers went into the house with Lena Mae. In the meantime this plainclothes officer walked over to me and said, "What is it all about, Richard"—

The Court: No, I am not interested in what happened between you and the officer. I am interested in what happened between the defendant Wilkins and other people.

A. That is what I was trying to—

The Court: If you will just get right to the point.

A. Anyway, she went into the house with these 2 officers. She was cussing and raising sand so I was asked at this time what was wrong with her,

(Testimony of Richard W. Burge.)

was she under the influence of narcotics or whiskey and I said, "I don't know. She is under the [104] influence of something, don't you think?" So then she came out and was talking and they got in the Officers' car and carried her away in the car.

Q. Was that one of the officers that asked you whether or not she was under the influence of narcotics or drunk or what was wrong with her?

The Court: Yes, the court understood that as such.

A. Yes, that was one of the officers that came down. Officer Pass called for them to come down and move her away from there.

Q. In your opinion, from what you know of Lena Mae Wilkins when she is sober and when she is drunk, was she at the time you observed her on the day that Yokely was arrested responsible——

Mr. Kirkland: Object to the question, Your Honor. It has already been answered.

The Court: Well, the only question is this; Whether or not she was drunk or sober at that time and as to the degree the court is going to have to determine that from the testimony. It is asking for a conclusion.

Mr. Dunn: Will the court permit this question? In your opinion was she so drunk she was irresponsible?

The Court: You may answer it.

Q. In other words, would you——

The Court: Just a moment, please. Let the witness [105] answer.

(Testimony of Richard W. Burge.)

A. I have observed her drinking and being refused drinks in bars. Sometimes the bartenders wouldn't serve her any more because they would say, "Mickey, you are getting abusive now." Some of her actions has caused me to come to the conclusion that when she is drinking she is really not responsible for some of the things she says and does and if the court may allow me I will give the reason for why my opinion is of that.

The Court: Well, you may do so.

A. Well, I don't think a person that is in their right mind would say the things she did to Judge Folta.

The Court: Well, excepting this, I am not concerned about what she said other than on that day. I am not concerned about what she said to some other judge or on some other occasion.

A. That is the only way I can form an opinion, is by some of her actions. When I have reason to believe she has been drinking quite heavily some of the things she does I really don't think she is rational.

Q. (By Mr. Dunn): Mr. Burge, was she acting the same way on the day in question as she was acting before Judge Folta?

A. I wasn't up here in court.

Q. I am sorry, I thought you were.

A. I merely know the results of that. [106]

Q. On the day in question was the defendant Wilkins visually upset, nervous, irritated, excited?

A. She was quite irritated, yes, sir.

(Testimony of Richard W. Burge.)

Mr. Dunn: No further questions.

The Court: You may cross-examine, Mr. Kirkland.

Cross-Examination

By Mr. Kirkland:

Q. Mr. Burge, did one of the defendants in this case, Mr. James Taylor Yokely, testify before the Grand Jury which cleared you of a second degree murder charge?

Mr. Buckalew: Object on the grounds it is immaterial.

The Court: We are not questioning at this time on any relationship other than sobriety or lack thereof of the defendant Wilkins.

Mr. Kirkland: This would go towards the credibility of this witness to show bias, friendship and favor.

The Court: Well, a certain amount of that, but how would that affect the defendant Wilkins?

Mr. Kirkland: They are both co-defendants, Your Honor. If the testimony of the defendant Wilkins is knocked out, obviously there would be none against Mr. Yokely or the case against Mr. Yokely would be so greatly weakened anyway. [107]

The Court: What is your position, Mr. Buckalew?

Mr. Buckalew: I would object to it on several grounds. On the first ground I object to the form of it. On the second ground I object to it because the Grand Jury didn't indict Mr. Burge for murder

(Testimony of Richard W. Burge.)

and if this man was one of the witnesses that wouldn't show anything because the Grand Jury didn't indict Mr. Richard Burge for murder. That shows the Government didn't have enough to indict this man.

The Court: In that respect it does have some probative value as to relationship as Mr. Kirkland indicated. On the other hand, I feel the form of the question is improperly stated, therefore, the objection will be sustained on that ground.

Mr. Dunn: Your Honor, may I make an observation?

The Court: No, the court has ruled.

Q. (By Mr. Kirkland): Mr. Burge, did you serve drunks in your bar?

Mr. Buckalew: Object to that, your Honor.

The Court: What is the relevancy, counselor?

Mr. Kirkland: Your Honor, the witness testified as to seeing the defendant in his bar under certain conditions and when he saw her in Commissioner's court she was acting the same way.

The Court: Excepting this, your question is, have you served liquor to drunks in your bar?

Mr. Kirkland: Very well, your Honor. [108]

The Court: You better tie it up with the case.

Mr. Kirkland: If the witness says no then obviously his testimony couldn't be correct about serving Lena Mae Wilkins whiskey.

The Court: There is no testimony he did serve her whiskey or that she was even in his bar while she was drunk.

(Testimony of Richard W. Burge.)

Mr. Kirkland: I don't wish to argue with the court, but on direct examination he testified he had observed her in his bar when she was drunk and getting mad and acting up. That is when she had to call him Mr. Burge rather than Richard.

The Court: I didn't understand it as such, counselor. The court recalls that he testified the bartenders have refused to serve her liquor, but not in his bar. Is that correct?

A. That is correct.

Q. (By Mr. Kirkland): Mr. Burge, then you did not testify that in your bar when she was acting like this she had to call you Mr. Burge?

A. No, sir, I did not testify to that fact. I testified, Mr. Kirkland, to the effect that I had observed and I have observed her in bars drinking and I have seen her being refused drinks because of her abusive actions towards the bartenders.

The Court: That is as the court recalls it.

Q. And in these other bars you would make her call you Mr. Burge?

The Court: That is not the testimony, counselor, again. [109]

Mr. Kirkland: Well, your Honor, obviously if it wasn't in his bar, it would have to be in someone else's bar.

The Court: Except this, you stated that he made her call him Mr. Burge. That is not the testimony.

Mr. Kirkland: Your Honor, on the defendant's direct examination he testified she would call him

(Testimony of Richard W. Burge.)

Richard on some occasions and Mr. Burge on other occasions and his testimony was when she was in this condition she called him Mr. Burge; that he made her call him Mr. Burge.

The Court: Mr. Burge, did you say you made her call you Mr. Burge?

A. No, sir.

The Court: Counselor, I am afraid you are in error on that point.

Mr. Kirkland: I may be, your Honor.

Mr. Dunn: Your Honor, we will submit to the record on the point.

The Court: Very well. Objection sustained. You may ask another question if you wish.

Q. (By Mr. Kirkland): Have you ever been convicted of a crime, Mr. Burge?

Mr. Buckalew: Object on the ground it is immaterial.

The Court: Objection overruled. You may answer.

Mr. Dunn: Your Honor——

The Court: Objection overruled. The court doesn't want [110] to hear further argument.

Mr. Dunn: If the court please, I certainly don't want to antagonize the court, but I think when this witness' testimony is to go to my client, too, I ought to be heard before the court rules.

The Court: I point out to you this is so academic. This question has come up before the court many times and it doesn't leave any doubt. Now, if you had some meritorious reason I would be glad to

(Testimony of Richard W. Burge.)

hear you, counselor, but it is so academic there shouldn't be any doubt.

Mr. Dunn: How does your Honor know what I have is not meritorious until you have heard it?

The Court: You can't object to something else other than what is before the court. The question was whether or not he had ever been convicted of a crime.

Mr. Dunn: Then I simply ask that the record show that I object to the court ruling prior to hearing counsel for the defendant Wilkins.

The Court: All right, let the record so show. You may answer.

A. Your question, Mr. Kirkland?

Q. Have you ever been convicted of a crime?

A. I have pleaded guilty to several crimes. I was guilty of, yes, sir—misdemeanors.

Q. And were any of these—the defendant Yokely in this case, a [111] co-defendant with you and pleaded guilty also with you in some of these that you are discussing?

Mr. Dunn: Objection, your Honor. It is an improper question. It can't go to the credibility of this witness and Mr. Yokely's reputation for truth and integrity is not in issue before the court at the present time.

The Court: Excepting this: I point out to you, counselor, and this is an academic rule of law and evidence, that counsel has a right to show the interest, if any, the witness has as pertains to these

(Testimony of Richard W. Burge.)

defendants. They are so interrelated, therefore, the objection is overruled. You may answer.

Mr. Buckalew: Your Honor, could I make an objection?

The Court: No, the court has ruled on that, counselor.

Mr. Buckalew: If I had an additional and new objection?

The Court: Yes. You may.

Mr. Buckalew: I want to ask the United States Attorney if he has verified records of this man's convictions with him here in court.

Mr. Kirkland: I contend, your Honor, I don't have to unless the defendant denies it then if I do not produce them at that time his Honor would have to believe the defendant. They are right down in the Commissioner's office.

Mr. Buckalew: I take the position that the witness has answered truthfully. He said he had been convicted of misdemeanors. That is all he can ask him. [112]

The Court: Objection overruled.

Mr. Buckalew: Could I ask your Honor this?

The Court: Yes, you may.

Mr. Buckalew: Does your Honor think that—and this is purely academic—if this witness and my client were convicted on the same charge of gambling, do you think that that would show any interest as to this witness and to my client?

The Court: It would have some probative value

(Testimony of Richard W. Burge.)

which is recognized by Wigmore. Have I answered your question?

Mr. Buckalew: I guess you have, your Honor.

The Court: Very well. You may answer.

Mr. Buckalew: I can't follow the court.

The Court: Well, the court will be glad to show you authority on that if you are in doubt. You may answer.

A. Well, I was arrested in Anchorage, in 1950, I think, for gambling at the V.F.W. private club and James Yokely was also arrested at that time and Mr. Buckalew was Assistant District Attorney at the time.

The Court: Thank you.

Q. (By Mr. Kirkland): Mr. Yokely is your friend, is he not?

A. Yes, I consider him my friend.

Mr. Kirkland: No further cross.

The Court: Any redirect?

Mr. Buckalew: No redirect, your Honor. [113]

The Court: Very well. You may be excused then.

(Thereupon, the witness was excused and left the stand.)

The Court: At this time the court will have to continue the trial. Mr. Hale, will you call the jurors back, please.

(Whereupon, the bailiff recalls the jury, the jury returns to the courtroom, and the following proceedings were had):

The Court: Can counsel come in tomorrow morning at 9:30?

Mr. Dunn: Your Honor, before answering that may I talk to the other witnesses that I have brought to court?

The Court: You may.

Mr. Dunn: Your Honor, counsel can be in court at 9:30 in the morning.

The Court: Thank you very much. Ladies and gentlemen of the jury, the matter which was to be determined out of the presence of the jury has not been concluded at that time and it doesn't appear to the court that it can be concluded for quite a little time; therefore, I think the court would be safe in excusing you until 10:30 tomorrow morning, although the court will reconvene tomorrow morning at 9:30. Now, do counsel for the Government or for the defendants believe it will be concluded before that time? How long do you think it will take you to put on your case reference this problem we are concerned with at the [114] present time, Mr. Buckalew?

Mr. Buckalew: Your Honor, we might call three more witnesses. It will probably take Mr. Dunn and I—we are just guessing—approximately two hours.

The Court: Well, I don't like to have the jurors wait around.

Mr. Dunn: Your Honor, if the jurors—may I make a suggestion?

The Court: You may.

Mr. Dunn: If the jurors are first admonished

not to appear in court so as to hear any parts of these proceedings, I would think that if they were requested to return at 11:30, there would be very little time wasted.

The Court: Well, we can't let this go on ad infinitum.

Mr. Kirkland: If the court please, could I make a suggestion?

The Court: You may.

Mr. Kirkland: Possibly the court could take over and interrogate these witnesses because this is for the benefit of the court and if the court takes over and does all the interrogation, this matter, I am certain, would be completed much sooner than at the present rate.

The Court: If it goes on inordinately, the court will have to—doesn't have any choice in the matter. On the other hand, I don't want to cut counsel off. I would think, ladies and [115] gentlemen of the jury, it could be pretty well summarized by 10:30. Therefore, you are now excused to report tomorrow morning at the hour of 10:30 a.m. The court will remain in session for other business. Again I must admonish you not to discuss this case among yourselves nor permit others to discuss it with you; that includes counsel, marshals, or anybody else, and if anybody does discuss this with you, or attempts to discuss it with you, would you report it to the court forthwith. You may now be excused to report tomorrow morning at 10:30 a.m., and the court will remain in session to take care of other business.

(Thereupon, at 4:30 o'clock p.m., December 21, 1954, this case was adjourned to the next morning, to be resumed at 10:30 o'clock a.m., December 22, 1954.) [116]

Court is convened at 9:30 o'clock a.m., December 22, 1954. At the request of the court the Deputy Clerk calls the roll of the trial jury, and each answers present to his or her name, whereupon the following proceedings were had:

The Court: Now, the trial was continued until this time in order that we could put on additional testimony concerning the admissibility of the statement at this time. The Court would ask the Clerk if I may see the same and read the same.

The Clerk: I don't have it, your Honor.

The Court: Mr. Sachen, do you have the statement?

Mr. Sachen: Yes, I do, sir.

The Court: May the court see it? (Statement was handed to the court.) What is the opinion of counsel for the Government as to what type of statement this is? Is it just a regular statement?

Mr. Kirkland: Introducing it as admission, your Honor.

The Court: Well, is the admission a statement or a confession?

Mr. Kirkland: Beg your pardon?

The Court: Is it an admission, a statement, or a confession?

Mr. Kirkland: It is an admission. It is a statement and admission as far as that goes.

The Court: Are you stating that it is not a confession [118] likewise?

Mr. Kirkland: Yes, your Honor, I am stating that is not a confession.

The Court: When does it fail to meet the requirements of a confession?

Mr. Kirkland: Wherein does it fail to meet the requirement of a confession?

The Court: Yes.

Mr. Kirkland: Through the particular crime that is charged here. There is no admission whatsoever as to an intent to conspire as to the conspiracy.

The Court: Very well. You may then call your next witness, Mr. Buckalew or Mr. Dunn.

Mr. Buckalew: Your Honor, could I approach the bench, please?

(Thereupon counsel for the defendant, James Taylor Yokely approached the bench and the following discussion was had):

Mr. Buckalew: Your Honor, I am kind of afraid to come up here this morning, but I don't really—don't know whether I'm coming down with the flu. I wanted to see the doctor at 9:30. I didn't get a chance to see him. I don't really feel like I can be alert enough to protect my client and I was afraid of the—I went home and went to bed last night, took fruit juices, and frankly, I'm dizzy and weak at my knees. I haven't seen a doctor and my chest is congested; my throat is sore; and my head is just [119] spinning around.

The Court: Well, the court wants to be fair with

you, but I point out to you there's been days I could scarcely hold up my head. I've been on the bench working because of the press of business here.

Mr. Buckalew: I will go on, but I want to see a doctor at noon.

The Court: I certainly haven't any objection to that.

Mr. Kirkland: Judge, in the event he does see a doctor and the doctor advises he to go home to bed, I would certainly like permission to call some witnesses from out of town just to introduce matters of record in the event——

Mr. Buckalew: I am not going to—I will fight it as long as I can, Judge, but the only thing that scares me, I felt like this once before and I kept going and ended up with pneumonia.

The Court: Well, of course the court doesn't want to force you into something like that.

Mr. Buckalew: That scared the devil out of me.

The Court: Ordinary headache or sickness—I tell you—this court—I haven't missed a day since I have been on the bench.

Mr. Buckalew: I am going to see Dr. St. John at noon. I will go until noon. I just don't want to be in contempt of the court if the doctor advises me I should go to bed. [120]

The Court: That is fair enough on that basis, but I want to be sincere because if we have a lot at stake—we have a lot of Government money being spent here.

Mr. Buckalew: I know the position the court was in getting this thing to trial and I didn't know whether I should say anything to the court or not.

The Court: Well, you are on record now, and I—of course, I will have to be understanding, counsel, in respect thereto. Thank you for calling it to my attention:

Mr. Dunn: I would like to call Mr. Albert Dungee to the stand.

The Court: Very well. He may come forward and be sworn.

ALBERT J. DUNGEE

called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows:

Mr. Dunn: I wonder if it would be appropriate, your Honor, to ask the bailiff to be on the alert for jurors that might come into the courtroom.

The Court: I am sure he will.

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please? [121]

A. Albert J. Dungee.

Q. Mr. Dungee, are you acquainted with the defendant, Lena Mae Wilkins? A. Yes.

Q. Did you see Lena Mae Wilkins on or about September 7, 1954?

A. Yes, to my knowledge.

Q. Now, did you see her the day that James Yokely was arrested down in Eastchester Flats?

A. Yes.

Q. Will you please—first, what is your occupation, Mr. Dungee?

(Testimony of Albert J. Dungee.)

A. The bartender at H&M.

Q. Which is in Eastchester Flats?

A. Yes.

Q. Where is H&M with respect to the defendant Yokely's house?

A. Across the street.

Q. Can you see the front of that house from the H&M—from the bar there where you are normally working?

A. At the bar you can look out the big window there right across the street to their house.

Q. Please tell the court the conditions and circumstances under which you saw Lena Mae Wilkins on the day that Yokely was arrested.

The Court: Just a moment, please, counselor. I am not interested in the entire day. The only thing I am concerned about is around about 10:30 a.m.

Q. What time did you see her? [122]

A. She came into the place between 9 and 10 o'clock that morning.

Q. And tell the court what you saw at that time, and any conversation that took place between the two of you.

A. At the time she came in she ordered a drink and get me a hard time, so I wouldn't serve her any drink and she sat there talking to herself and I was doing my cleaning that morning.

Q. What did you say to her in refusing to serve her a drink?

A. When she came in and asked for a drink I told her, "You look like you've had enough," and I wasn't going to give her no more.

(Testimony of Albert J. Dungee.)

Q. Was Lena Mae Wilkins drunk when she came into the H&M that morning?

A. Well, yes, as far as I'm concerned—to my knowledge, she was drunk.

Q. When you refused to serve her a drink, did she accept your decision, or did she argue with you? What was her attitude?

A. She kept arguing with me to give her the drink. I didn't pay her no mind. I just kept on doing my work.

Q. Did you see her walk?

A. When she came in the place—I was in the kitchen working at the time she came in and sit right down—right where the telephone is—corner of the bar.

Q. Did you hear her talking?

A. Yes, sir. When I wouldn't serve her, she was mumbling to herself there and I didn't pay no attention what she was [123] mumbling about.

Q. Did she make any telephone calls?

A. Yes, she did make a couple of calls, but seemed like she couldn't get—her party wasn't right there. She hung up and fussed with the telephone company.

Q. Did you hear her talking on the telephone?

A. Well, the last time she called her number, and I paid attention. She—the person she was wanting to talk to, and she said she wanted to speak to Chief Miller—I heard her say because I was in the kitchen doing my work. That is all I heard.

(Testimony of Albert J. Dungee.)

Q. Could you overhear her voice sufficiently to know whether or not her voice was normal?

A. I heard her talking both times, and when she was at herself and when she was drunk, and she—at this particular morning, she wasn't at herself.

Mr. Plummer: I object to the question and answer because there has not been sufficient showing that this man has known her previously to know whether she was normal, to know how she did act.

The Court: I thought he just testified—as I recall—that he had known her before.

Mr. Dunn: I don't know whether he did or not. I will establish that point if you are interested in it.

The Court: Let's check the record so that [124] point——

Mr. Dunn: I think Mr. Plummer is correct.

The Court: Excepting this—he had seen her before. Let's check the record, please.

Mr. Plummer: It might take time. I understand he had seen her on another occasion. He had testified two times.

The Court: That is right. That is the point I was ruling on.

Mr. Plummer: I wonder if that is sufficient, even alleging she was either drunk or sober on this occasion.

The Court: Of course, I point out the question of degree as to its probative value, and one other case. The court can't give too much credence——

(Testimony of Albert J. Dungee.)

Mr. Dunn: Your Honor, my next question will settle this.

The Court: Very will.

Q. (By Mr. Dunn): How long have you known Lena Mae Wilkins?

A. Over a period of two years.

Q. And have you served her drinks from time to time in the course of your business?

A. Yes. At H&M I have served her.

Q. Do you feel that you could tell when she was drunk and when she was sober so that you know when it was proper to serve her a drink?

A. I have served her when she was sober and I have served her [125] when she'd been drinking a lot, and I have refused a lot of times not to give her a drink.

Q. Did she say anything to you this morning concerning her activity during the night?

A. Not until afterwards. She came in there. She was mumbling about being put out or something.

Q. Did she say whether or not she'd been to bed that night?

A. I think she made the statement that she had been up all night—just coming in.

Q. Well, did she have a thick tone, or was her voice normal?

A. She talked like a person who had been drinking a lot.

Q. Was her condition such that you would be inclined to trust her to do something, or was her con-

(Testimony of Albert J. Dungee.)

dition such that you would say she was not responsible?

A. To my knowledge she was not responsible.

Q. Would you have trusted her to do anything that day?

A. Not that particular morning.

Q. Well, when this defendant is sober, is she inclined to be pretty talkative and sit around mumbling to herself, or is she inclined to be quiet and mind her own business?

A. She's a much different person. When she's at herself she don't have very much to say and she's very quiet, but other times, when she's under the influence of whiskey, Boy, she gives you a hard time.

Q. She gave you a hard time? [126]

A. She usually does when she's like that.

Q. Mr. Dungee, are you aware of the fact that there is a law in this Territory making it a crime to serve a drunken person?

The Court: The court is not interested in that, counselor.

Mr. Dunn: All right, your Honor. I have no further questions.

The Court: You have any cross?

Mr. Kirkland: Yes, I have some cross. I was hoping that the court would allow Mr. Dunn to ask that question.

The Court: No, there is limit to what we can do. We are not going to try collateral issues at this time. We are trying one thing only; that is, whether or not this statement is admissible.

(Testimony of Albert J. Dungee.)

Mr. Kirkland: I would submit to the court it would be proper on cross-examination though.

Mr. Dunn: Your Honor, he wouldn't let me ask it on direct. It would just, without argument, exceed the scope of direct.

The Court: The Government has ruled. Please proceed.

Cross-Examination

By Mr. Kirkland:

Q. What is your name again, sir? [127]

A. Albert L. Dungee.

Q. Now, Mr. Dungee, have you refused to serve Lena Mae Wilkins since that date for the reason you claim she was a stoolie?

A. She had been barred out of the place the following day.

Q. And she was barred out of the place the following day? A. Yes.

Mr. Buckalew: Object to that, your Honor, on the ground it's immaterial. I should have an opportunity to make an objection.

The Court: That is right. You do. Objection overruled.

Q. (By Mr. Kirkland): You have never been convicted of a crime, have you, sir?

Mr. Dunn: Your Honor, I object to that question.

The Court: Objection overruled. It's proper on cross, any phase of it.

A. Yes.

(Testimony of Albert J. Dungee.)

Q. What crimes?

A. Manufacturing and possession of distilled——

Q. Distilled spirits? A. Whiskey.

Q. Whiskey?

A. 1929, Washington, Pennsylvania.

Q. That's some time ago. A. Yes, sir.

Q. None since then? [128] A. No, sir.

Q. And where did you say you were this morning she was in there? Were you in the kitchen or out in the bar?

A. I was doing my work behind the bar at the time she came in.

Q. Were you present when Mr. Pass came down to talk to the defendant, Lena Mae Wilkins, that morning? A. She wasn't there.

Q. She had left before the police officers arrived?

A. She had left there. She called a cab and left right after she made the telephone call. I didn't see her no more until when the police were over there at Yokely's house.

Q. Did she leave immediately after she made the phone call?

A. Well, the cab come and picked her up.

Q. Cab came and picked her up. Is the defendant still barred from your place of business?

A. As far as I know Honeycutt has barred her away from the place for good.

Q. And that was the day after she gave this statement to the Federal Bureau of Investigation?

A. That was the following day when she came

(Testimony of Albert J. Dungee.)

back down there. The Honeycutt's wished her not to come back in and told me to keep her out.

Mr. Kirkland: No further cross.

The Court: Any redirect?

Mr. Dunn: No redirect examination, your [129] Honor.

The Court: Very well. Now, counsel for the defendants have put on two witnesses. You may be excused, Mr. Dungee.

(Thereupon, the witness was excused and left the stand.)

The Court: In rebuttal to the testimony of the Government concerning the sobriety of the defendant, Wilkins—Now I point out to you that in a confession, which this is not, but which is certainly much more serious and goes to a different aspect of the law, and I would conclude to be much more important than statements against, interests the law, as follows: "The fact that the accused is under the influence of liquor or drugs which affected his recollection does not make his recollection inadmissible. The intoxicated condition of an accused at the time of making a confession does not, unless such intoxication goes to the extent of mania, in the law of evidence concerning a statement made by parties while in the state of intoxication, at least not conclusive against him." Now, counsel for the defendants have failed to prove by two witnesses that there has been any intoxication to the extent of mania, and therefore, I think any further evidence

at this time would be time consuming—would not have any value. The amount of emphasis that is to be placed upon this confession—or this statement—or whatever you want to call it, is to be determined as issue of fact by the jury and therefore, the court rules at this time that if counsel does offer the same, based upon your—oh, evidence of your two witnesses, that the statement is admissible. [130]

Mr. Dunn: Your Honor, possibly from the evidence added to the court, further witnesses at this time would be time consuming, without avail. However, following one line of standard procedure, I have saved my—what I thought at least was my best witness until last, trying to build up this matter of intoxication. Now, if the court doesn't think its opinion would be changed as a result of my best witness, am I to understand then that I am to recall the two witnesses that have already testified at such time as the jury is here, in the event this statement is offered?

The Court: No. The court did not so intend.

Mr. Dunn: All right. Am I to be barred from recalling those witnesses to give the same testimony that they have already given the court?

The Court: The court wouldn't rule on that at this time, but you have the right to put on the defendant if you so desire.

Mr. Dunn: I have a right, as I understand it, your Honor, to put on any witnesses if I—

The Court: That is right.

Mr. Dunn: —so desire. Thank you.

Mr. Buckalew: One point—Has His Honor ruled whether or not that statement is a confession?

The Court: No. The court has not. As a matter of fact I don't think it's a confession, but I point out to you that [131] a confession in this court's opinion has a much farther reaching effect, an inclusive effect, than does a statement, and I may be in error in my conclusion of law in that respect, but I point out to you that it is the opinion of the court based upon your own evidence. Now, let me point out to you, Mr. Buckalew, we have had Mr. Sachen, who is a member of the F.B.I. We have had Mr. McLaughlin, who is City Magistrate, and Mr. Hartlieb, who have testified and who have stated that she was not intoxicated. Mr. Sachen, as I recall, testified that she had been drinking. Mr. Hartlieb didn't know she had been drinking, and, as I recall, the Magistrate didn't recall she had been drinking. Now, in rebuttal to this you have put on two witnesses who state that she was in a state of drunkenness, but you haven't proved in any sense of the word that she was in a state of mania as is required by the law of confession. And thus, any more time to hear other additional witnesses would be time consuming and would not avail you of any benefits.

Mr. Buckalew: Is your Honor at this state of the proceedings taking the position that intoxication goes to credibility rather than admissibility?

The Court: No. We will—Just a moment, please. The court takes the position that the state of intoxication would go—yes, I would agree to the extent of credibility to a certain extent, but it is a

question of fact for the jury to determine, not for the court. The court only has to determine whether or not [132] it is admissible, and based upon your evidence which you have produced at this time, and which I am convinced you could not rebut, based upon witnesses such as the F.B.I., the Magistrate, and the Commissioner. Now, the court isn't influenced by this at this time. Also, that is something that the court could not be influenced by, but the court is influenced by these people who have testified because of their integrity.

Mr. Buckalew: I don't mean to slur anybody in Governmental positions, but from my observation of the defense witnesses, the Government witnesses, I got the impression that the defense witnesses were more straightforward.

Mr. Kirkland: Excuse me, if the court please——

The Court: The only bad part of it, counselor, you are not the one that makes the ruling.

Mr. Buckalew: I just wanted to point it out to His Honor.

The Court: Very well. Now, do I understand, Mr. Kirkland, that you do intend to offer this?

Mr. Kirkland: That is correct, your Honor.

The Court: It has not been offered up to this date; therefore, the ruling of the court is, based upon the evidence adduced so far—I don't wish to shut you off, Mr. Buckalew and Mr. Dunn, but based upon the law, which you should certainly be aware of, and which the court spent most of the night looking up himself, is convinced that you haven't proved a *prima facie* case [133] to rebut the inadmissi-

bility of this particular witness' statement. I point out to you further, the question of motive is more or less unimportant, no matter how made. She may have been at Mr. Yokely's at the time. It doesn't have too much of a bearing upon this particular situation, and there has been a lot of law written on this point, lots of decisions. I haven't checked all the law, but I have checked considerable, and I am convinced, based upon the evidence submitted so far, that you have not rebutted the proof of the Government, and therefore, the document may be admitted in evidence over your objection. Let the record show that counsel takes exception to the ruling of the court.

Mr. Buckalew: Your Honor, there is—I think at this stage of the defense counsel should have an opportunity to examine the document and I'd like to point out to the court there is a lot of irrelevant material in here, and I think that we should have an opportunity to go through and read the statement, line by line, with the opportunity to object to every line and have His Honor rule on the immaterial and irrelevant matter in the statement.

The Court: I point out to you, counselor, that the court looked into that point also, and I am quoting Am. Jur. 20 in that respect. The mere fact portions of it may be irrelevant and immaterial does not preclude that from being struck out of the statement, and therefore, I am afraid you would be just wasting your time to look into the law unless I am in error, but [134] I think I have very diligently searched on that point.

Mr. Buckalew: Your Honor, I understood the law definitely.

The Court: The court will be glad to hear you if you can prove to the contrary. I don't think there is anything else to come before the court at this time. Therefore, the court will recess until 10:30.

(Whereupon at 10:30 o'clock a.m., December 22, 1954, court reconvenes, following a 20-minute recess, the jury having been recalled to the jury box, and the following proceedings were had:)

The Court: You may call the roll of the jury.

The Clerk: Trial jury is all present, your Honor.

The Court: Mr. Sachen, will you please resume the witness stand?

JOSEPH V. SACHEN

resumes the witness stand and testifies as follows:

The Court: You may proceed, Mr. Kirkland.

Direct Examination

By Mr. Kirkland:

Mr. Sachen—Excuse me, if the court please, I don't remember what my last question to the witness was.

The Court: Well, the court doesn't either. As I recall, [135] it was concerning the admissibility of this particular document, and as a matter of fact, it was testimony concerning the status of in-

(Testimony of Joseph V. Sachen.)

toxication, if any, of the witness, Wilkins—of the defendant, Wilkins.

Q. Mr. Sachen, the statement which you have in front of you—Now, when did you say that was taken?

A. That was taken September 7, 1954.

Q. And that is the statement of the defendant, Lena Mae Wilkins? A. Yes, it is.

Q. And does that statement—Did you then go before the United States Commissioner with that statement? A. Yes, I did, sir.

Q. And in your presence, and in the presence of the United States Commissioner, the defendant, Lena Mae Wilkins, swear to the truth of that statement? A. That is right.

Mr. Kirkland: Your Honor, I'd like to offer this statement into evidence at this time.

The Court: It may be admitted in evidence. Let the record show counsel have had a chance to see, also they object to its admission, and the court has already ruled on the admissibility thereof.

Mr. Dunn: That is, counsel for both defendants.

The Court: That is correct. Marked Plaintiff's Exhibit No. 1. Now, will counsel stipulate at this time that Mr. Kirkland [136] may read it in whole or in part at this time, and that either counsel may use it in whole or in part at this time or later time?

Mr. Dunn: Your Honor, we can't stipulate that he may read a statement that we objected to as being inadmissible. To do that would eradicate our objection.

(Testimony of Joseph V. Sachen.)

The Court: I—That isn't true, counsel, I don't believe.

Mr. Dunn: I am afraid to stipulate because of that.

The Court: Very well. The court will instruct you to read it at this time.

Mr. Buckalew: Your Honor, may we take one more look at this time?

The Court: Yes, you may.

Mr. Buckalew: Would the Government give me a copy so I can follow the Government when he reads the statement?

The Court: Do you have a copy, Mr. Kirkland?

Mr. Kirkland: No, your Honor, I don't have a copy of it. However, it will be a matter of record as to what I read in there, and I assure counsel that I will not read anything into the statement that wasn't there.

Mr. Buckalew: I just wanted to follow it.

The Court: Apparently he doesn't have it then, Mr. Buckalew. Very well. You may proceed, then, Mr. Kirkland.

Mr. Kirkland: Ladies and Gentlemen. This is the Government's Exhibit No. 1 in this particular case. The document [137] is dated September 7, and it reads as follows: "I, Lena Mae Wilkins, make the following voluntary statement to Joseph V. Sachen who I know to be a Special Agent of the Federal Bureau of Investigation. No threats or promises have been made and I realize I do not have to make a statement. I have been told that any state-

(Testimony of Joseph V. Sachen.)

ment I make may be held against me in any court. I have also been advised that I may be represented by a lawyer.

“My name is Lena Mac Wilkins, and I (“I” has been inserted and initialed by the defendant, Wilkins,) am 33 years of age and born on April 2, 1921, at Birmingham, Alabama.

“On the 2nd of April, 1954, James Taylor Yokely came up to me and stated that at the present time he didn’t have any girls working for him. He stated that he had a house on 1806 E “I” St. in Anchorage that I could work out of and the money I made would be for me, my kid and himself. He also said that he would take care of me if I hustled for him.

“Previously to that time I was hustling in Anchorage and had saved \$960.00. At this time I had a room at Mr. & Mrs. Marvin Clark’s home on E 8th St. This money that I saved I gave to Yokely.

“On April 4, 1954, I moved to Yokely’s house and started to hustle out of Yokely’s home. I turned one trick during this time for \$20.00, I gave Yokely \$10.00 and I (“I” inserted and initialed by defendant) kept the other \$10.00.

“On 8th or 9th of April, Yokely asked me to go to Fairbanks, [138] Alaska, because there is more money to be made there. On one of these days he gave me \$33.00 to purchase a ticket at a downtown ticket office. Airlines, I don’t exactly remember. He then gave me his luggage to pack my clothes. He then took me to the airport in his 1952 or 1953

(Testimony of Joseph V. Sachen.)

Buick. He watched me board the plane. I think it was around 8:30 p.m. He also told me to hustle on the main thoroughfare in Fairbanks and that he would come up and see me in 2 wks.

“He came up the following Sunday. I had only made \$40.00 up to that time which I gave to him. Up in Fairbanks I hustled out of taxi cabs.

“Yokely received a phone call from Kodiak, Alaska, and said there was some money to be made up there and would I like to go. I said sure if you want me to. The 4 days I stayed in Fairbanks Yokely lived with me. He then gave me \$75.00 to buy the ticket. On top of that he stated he had \$40.00 left and he'll split it with me. He gave me \$20.00. I'm not sure but I think it was the 12th or 13th (dates changed and initialed by defendant) of April. I left on the night flight which was about 8:15 p.m., and I used my true last name on the ticket.

“I took the plane to Anchorage where there was an overnite stop. That nite I stayed at Yokely's place that nite and took the morning flight to Kodiak, Alaska. I think it was about 8:30 a.m.

“On my arrival in Kodiak, I found a place out of the city [139] limits and started to hustle. On that week end I made \$200.00. I sent \$160.00 to Yokely. I sent the letter registered and used the name of Carl Samuels on the return address. I did this as instructions from Yokely. He wanted it that way he said because he didn't want a federal

(Testimony of Joseph V. Sachen.)

investigation. Although I sent \$160.00 I only registered the letter for \$100.00.

“After 3 days in Kodiak, USM Disney came to me and said he was aware of my activities and if I wanted to stay in his town I had to get a *legitimate* job. I worked in a home as a maid for 2 days. The people’s name I don’t remember. Mr. Disney again came out to see me and said he was aware of the phone call from Fairbanks and that I was sent to Kodiak for immoral purposes.

“I then started to get panicky and told Bill Jordan, a friend of Yokely’s, that I needed the fare to go to Anchorage. Yokely sent \$45.00 to Jordan, he gave me \$40.00. He sent this money by wire.

“On the 13th of May, I took the afternoon flight to Anchorage where I was met by Yokely at the airport and he took me to his house. I hustled for him from that date till July 31, 1954. I did all the hustling out of Yokely’s home. Up to this date I figured I had made about \$8,000.00. Up to this date and only \$450.00 has been spent on my kid and mother.

“I also want to add that on May 22, 1954, Yokely left for Portland, Oregon, to see his so-called wife Margerite Yokely, address unknown. On May 25, 1954, he wired me to “Send the money.” I sent him by wire \$15.00 the same day and signed it James Kirby [140] Yokely. I then sent \$50.00 on the 26th of May and another \$50.00 on the 27th of May. I sent all this money by wire and signed it by James

(Testimony of Joseph V. Sachen.)

Kirby Yokely. On June 1, 1954, I received a wire from Yokely stating "Margie had gone to Fairbanks. Everything worked out R.O.K. Will see you soon." Yokely was the signature on the wire and this wire was addressed in my right name.

"I have read the above statement and it's true to the best of my knowledge. Signed Lena Mae Wilkins, witnessed by Joseph V. Sachen, FBI, Anchorage, Sept. 7, 1954; Theodore E. Pass, Det., Anchorage Police Dept. Subscribed and sworn before me this Sept. 7, 1954. Gordon W. Hartlieb, United States Commissioner."

Q. (By Mr. Kirkland): Now, Mr. Sachen, after this statement was verified—Excuse the question. After this statement was signed and a warrant was issued, did you go to the home of the defendant, Yokely to take him into custody?

Mr. Buckalew: Object to that on the ground it is something that happened after the commission of crime.

The Court: What relevancy, counselor?

Mr. Kirkland: Your Honor, maybe I should approach the bench with counsel rather than state it in front of the jury.

The Court: Very well.

(Whereupon, counsel for plaintiff and counsel for defendant, together with the reporter, approach the bench and the following proceedings were had out of the hearing of the jury:) [141]

(Testimony of Joseph V. Sachen.)

Mr. Kirkland: I am going to show that the defendant, Yokely, when the officers came down to arrest him, that the defendant, Lena Mae Wilkins, was in their company and that the defendant, Yokely, when finding out what he was arrested for struck the defendant, Wilkins, with his fist and the purpose of showing—that is to show guilt on his part by striking the defendant, Wilkins, the same being a threat or the actual—the jury could infer as a threat against her testifying. I contend this does not have to be. The person doesn't have to say, "I'm threatening you," but that the acts of the defendant can be considered by the jury for what they are worth as to whether or not it was a threat against her testifying.

The Court: Well, the court feels that the question itself is objectionable and the objection will have to be sustained. You may ask him what he did as a result of that.

Mr. Buckalew: Your Honor, I don't think it's admissible for the reason I don't think it shows any threat on the part of Yokely.

Mr. Plummer: That is for the jury to decide.

The Court: That is a question for the jury.

Mr. Buckalew: I am not through yet.

The Court: Yes, let Mr. Buckalew finish.

Mr. Buckalew: I've got the flu. I don't feel like doing anything.

Mr. Yokely: Your Honor, may I listen to the conversation, [142] too?

The Court: Yes, you may.

(Testimony of Joseph V. Sachen.)

(Defendant Yokely approaches the bench.)

Mr. Buckalew: It shows conduct on the part of Yokely which would go to his—which would have value as far as his guilt or innocence. In fact, I think it could be construed as an act consisting of innocence in that there was an F.B.I. agent, Officer Pass—uniformed officers present, and if he had any idea of intimidating the Government witness, he wouldn't have done it under those circumstances. It only indicates that this man, and I think the evidence will show, committed himself to abusive language.

The Court: Not too loud, please.

Mr. Buckalew: Vile epithets were heaped upon his head to the point where he lost control of himself and I think any man in that same situation would have reacted in the same manner that Mr. Yokely reacted.

The Court: Well, in that respect the court takes the position it is a question of fact for the jury to determine and not for the court. Your objection will be sustained as to the form of question asked, but he may ask what was done by this witness. Let the record show you object and take exception in respect thereto.

Mr. Dunn: I'd like to be heard on that, Your Honor.

The Court: You may.

Mr. Dunn: The objection's the same one that has been [143] previously made to the effect that it's not proper to allow the prosecution to prove a

(Testimony of Joseph V. Sachen.)

conspiracy by acts which occur subsequent to the termination of the conspiracy. And unless it is offered to prove that it is an irrelevant matter, if it is used for any purpose other than that, it is irrelevant, and if it is used for that purpose it is inadmissible in my opinion. That is all.

The Court: Very well. The objection will be overruled. Then you may inquire. * * * If you want to come up each time that your counsel comes up, I haven't any objection, Mr. Yokely.

Mr. Yokely: Thank you.

The Court: And likewise true for Miss Wilkins. It is very highly irregular, but if you want to, you may do so. * * * Objection is sustained as to the form of the question, but you may rephrase your question, Mr. Kirkland.

Q. (By Mr. Kirkland): Mr. Yokely, what, if anything occurred—I mean, Mr. Sachen, excuse me, sir. What, if anything, occurred at the time the defendant Yokely was taken into custody?

A. When the facts were presented to the Assistant United States Attorney, Jim Fitzgerald, he signed a complaint and we went down to 1806 East "I" Stret to apprehend Yokely. As we arrived at the door, I made one knock, and at that time, Lena Mae Wilkins gave me a key and said, "You can go right in," which Officer Pass and myself did. We asked Lena Mae [144] what bedroom was Yokely's and she said, I think it was the second or third on the left. We knocked at the door there and we saw Margie Yokely there and asked her where

(Testimony of Joseph V. Sachen.)

James Yokely was, and she said that he's in the bathroom. Well, we proceed to the bathroom and I knocked at the door and he was busy there and I told him as soon as he gets through I'd like to talk to him. When he came out I told him that we had a warrant for his arrest, and he stated to me that we didn't have any right and I told him we had a warrant. He would have to come with us to appear before the United States Commissioner and I was placing him under arrest at that time. I told him at that time that he did not have to make any statement to me. I also told him that anything he did say to me would be held against him in any court of law. I told him that he has the right to have an attorney. After——

Mr. Kirkland: Excuse me. Did you serve the warrant on him at the same time?

A. Yes, Mr. Pass did—in my presence.

Q. Did you advise him what he was under arrest for?

A. Yes, we did. Then, at that time Lena Mae was using loud language and abusive language—very abusive language against Yokely. And I went over to Lena Mae. I said, “Lena Mae, don't do it.” I said, “Refrain. We have him in custody,” and she says, “Well, let me show you what he has done with my clothes.” So she took me to her room and in her room, [145] in a closet, was all her clothes thrown in a big heap. I told her that I couldn't do anything about it. And she kept on cussing abusive language

(Testimony of Joseph V. Sachen.)

towards Yokely. In the meantime, Yokely was getting dressed and we marched, or we walked out of the house. I went first, then Yokely, and then Detective Pass. She was still screaming at him stating that, "I hope that she can give you . . ." or words equivalent to this. I don't exactly remember. "I hope she can give you \$8,000 like I gave. I hope you're satisfied," and she kept on using very foul, abusive language, and I again told her, "Lena Mae, please keep quiet," as we walked out of the front door, and about 20 feet, I would say, going to the door, I opened the front door and told Yokely to enter, but in the meantime, he took a swing and hit Lena Mae on the top of the head with his fist. At that time I turned around and grabbed him, put the handcuffs on him, and put him in the car. Then I told Yokely, "I think you have another charge against you. I will have to discuss this with the United States Attorney." In the meantime, Yokely stated to me that he didn't want Lena Mae around the house with his wife, Margie Yokely, and asked to if I would see that she would get her clothes and get out. I told him it wasn't my duty, but I would do it, so Detective Pass got on the Radio and called up other uniform police to handle the situation while we took Yokely in front of the United States [146] Commissioner. After uniform police came there, we took Yokely back to the court house here and presented him in front of the United States Commissioner.

(Testimony of Joseph V. Sachen.)

Q. Now, Mr. Sachen, in this statement of Lena Mae Wilkins, did you contact the ACS Postmaster at Kodiak, and so forth to verify it?

A. Yes. I didn't do it. One of the other agents did, although the dates in that statement aren't exactly correct.

Mr Buckalew: Just answer the question.

A. Yes, Mr. Buckalew.

The Court: Objection sustained.

Mr. Kirkland: Your witness.

The Court: You may cross-examine.

Cross-Examination

By Mr. Buckalew:

Q. Mr. Sachen, would you tell me everything that Lena Mae said when you were in the house making the arrest? A. The arrest?

Q. Yes.

A. Everything she said to me?

Q. That you can remember. You testified she mentioned the \$8,000 and that is about it. What else do you remember? [147]

A. She mentioned her clothes, as I have stated. That is what he says here. "... what he has done with my clothes," and she took me to her room and showed me her clothes. In the meantime she was also looking for a telegram, which I forgot, and her sending that money down to Yokely when he was in Portland, and she couldn't find it.

(Testimony of Joseph V. Sachen.)

Q. Just what did she call Mr. Yokely?

Mr. Kirkland: Excuse me, it's a very foul word, your Honor.

Mr. Buckalew: Your Honor, I don't—His Honor mentioned the word "mania." I think that the jury should know this woman's state of mind. That is the only way I can get it before the jury. Now, he is—the \$8,000 and clothes, that is favorable testimony from the government. I should elicit everything that happened that went into it. I want to know everything that went on down there.

The Court: I agree with you. You have the right to know, excepting I hate to subject the jurors, too, and the court personnel to that type of language. If you feel it's mandatory, you can assume that responsibility.

Mr. Kirkland: The Government will stipulate it's just about as vile as could be expected out of any woman.

Mr. Buckalew: Could I speak with my co-counsel?

The Court: You may.

(Mr. Buckalew and Mr. Dunn confer together.) [148]

Mr. Buckalew: Your Honor, I think that under the circumstances, if the Government is willing to, we can draw up some sort of stipulation, that the language is about as foul as you can get. That would be sufficient as far as the defense is concerned.

(Testimony of Joseph V. Sachen.)

The Court: Very well. Are you willing to stipulate to that, Mr. Kirkland?

Mr. Kirkland: Yes, your Honor. I know what the language is and I don't see any sense in subjecting everyone to it.

The Court: It isn't a question whether you know what it is. It is a question whether you will stipulate to it.

Mr. Kirkland: Yes.

Mr. Buckalew: The defense is willing to stipulate to it.

The Court: Very well. Let the record reflect that the statements of Lena Mae Wilkins were just about as foul as they could get and were directed toward defendant Yokely.

Q. (By Mr. Buckalew): Mr. Sachen, what was Lena Mae's state of mind at that time?

A. She was very angry, sir.

Q. Would you say she acted like a woman that was out of her head?

A. That is a hard question to answer.

Mr. Kirkland: Objection.

The Court: Objection overruled. You may answer.

A. I'll say she was very angry. I don't know if she was out of [149] her head.

Q. Did you tell her on several occasions to quit this screaming at Yokely?

A. Oh, yes; I did, sir.

Q. Did that have any effect on her?

(Testimony of Joseph V. Sachen.)

A. For a moment or two, then she came right back again.

Q. Did any of the other officers tell her to quit screaming? A. Not that I remember.

Q. How many officers were present when the arrest was made? A. Two, sir.

Q. Now, when Mr. Yokely was in the bathroom, did you identify yourself through the door?

A. Yes.

Q. Did Mr. Yokely ask you where you got the key? A. Yes, he did.

Q. What did you tell Mr. Yokely?

A. I didn't tell him.

Q. Just didn't answer that question?

A. That is right.

Q. About what time of the day was this?

A. The arrest of Yokely?

Q. Yes.

A. As a guess, around 2:00 o'clock. Between 2:00 and 2:30, I'd say.

Q. Did you still smell liquor on Lena Mae's breath at that time? [150]

A. I can't remember. I don't think so.

Q. Would you describe to the jury exactly how Lena Mae was acting—that is, was she waving her arms around?

A. She was walking back and forth shouting at Yokely that he'd done her wrong and cussed her, like I previously said, every cuss word that there's available, that I know, anyway.

Q. Was she acting like a drunken woman?

(Testimony of Joseph V. Sachen.)

A. She acted like a very angry woman.

Q. Did she act like an angry woman that had been drinking?

A. Like an angry woman that's been drinking? Well, I think you can get angry whether you are drunk or not, can't you, Mr. Buckalew? She was very angry. That is as much as I can tell you about that.

Q. Now, when you first interviewed her, you smelled alcohol on her breath, did you?

A. Yes; I did.

Q. Did she appear to you like she had been up all night?

A. I think she could have been up all night. I never asked her. She appeared like she would be. I'm not sure.

Q. Didn't you testify in this court that she looked like she had been up all night?

A. I said she looked like it. I'm not sure.

Q. Did you smell alcohol on her breath?

A. Yes; I did.

Q. That was around—oh, 10:00 o'clock in the morning? [151]

A. 9:00 o'clock, sir; around 9:00.

Q. Now, did you have Lena Mae in protective custody, so to speak, from 9:00 until 2:00?

A. Protective custody? No, after I'd taken a signed statement—I think I said this once before, your Honor.

The Court: You must answer the question.

A. After I came to the police station, we took

(Testimony of Joseph V. Sachen.)

the signed statement. She was with us up to the time we took her down to the flats again and I would say that was from 9:00 o'clock until 11:30 or so.

Q. Did Lena Mae advise you at that time she needed a couple more shots of scotch?

A. No; she wanted a dollar and I gave it to her. I'm quite sure it was cab fare to come back and meet us at the police station at 1:00 o'clock; the arrangements we had made there.

Q. During the course of taking this lengthy statement, did she advise you that she spent all her money that morning tipping the cab driver?

A. Not that I remember, sir.

Q. You don't recall Lena Mae telling you that she spent everything she had and gave it to the cab driver?

A. I don't remember that, sir. If she did, I don't remember.

Q. Did you put everything in the statement that Lena Mae said?

A. Practically everything she said; yes, sir.

Q. Could I see the statement, please? (Statement was handed to [152] Mr. Buckalew.)

Q. Did Lena Mae write this out in longhand?

A. No; I wrote it first in longhand, sir.

Q. How long did it take you to write the statement in longhand? A. Oh, I can't remember.

Q. Well, have you got your little notebook there?

A. No; I haven't got it with me, sir.

Q. Could you give me an approximation how long it took?

(Testimony of Joseph V. Sachen.)

A. Oh, I'd say about an hour and a half, something like that—between an hour and an hour and a half.

Q. Did you examine her thoroughly?

A. Did I examine her?

Q. Or did you just let her talk?

A. She was my witness at that time and she was making the complaints and I just let her talk. She voluntarily came and gave that statement to me. I didn't have to ask her anything.

Q. You didn't ask her questions then during it?

A. I asked her exactly what—she gave it to me. She voluntarily came. I didn't ask her for any statement, Mr. Buckalew.

Q. Now, I am talking about the contents of the statement.

A. That is what she gave me. She voluntarily gave it.

Q. Now, it took an hour and a half. You didn't ask her a question during the hour and a half? [153]

A. I probably asked questions. I don't remember. Questions like, "Is this the way it was, Lena?" Usually in signed statements it's that way, Mr. Buckalew.

Q. Did you try to write the statement in Lena Mae's own diction there?

A. Yes; as much as I could.

Q. She told you that over a course of time that she had given James Taylor Yokely \$8,000?

A. Yes; she said that.

Q. Now, will you look at the statement and tell

(Testimony of Joseph V. Sachen.)

me how long she had been hustling to make \$8,000?

A. Well, she made this statement. She said——

Q. Did you try to verify that?

A. No; I didn't verify it because I didn't see any reason to, Mr. Buckalew. She says from May 13—oh, it's 13th of May, "I hustled for him from that date till July 31, 1954. I did all the hustling out of Yokely's home. Up to this date I figured I had made about \$8,000.00."

Q. Now, how much is that a month? How many months did she hustle?

A. How many months from May?

The Court: Mr. Buckalew, the court would like to interpose objection to that. It is a matter of mathematical construction. It's obviously asking for a conclusion. Everybody can figure it out. It doesn't have any probative value. [154]

Mr. Buckalew: Well, it might, your Honor.

The Court: In what respect?

Mr. Buckalew: These gentlemen are very thorough on everything else, apparently, and I just want this man to realize how absurd this statement is as far as the \$8,000.00 is concerned, and I want to point it out to the jury.

The Court: Let me point out to you, counselor, that is a question of argument and no matter what he may have—I think it will have no bearing upon the outcome of this case. It's a matter of argument, counselor.

Q. (By Mr. Buckalew): During the hour and

(Testimony of Joseph V. Sachen.)

a half you only interposed a couple of objections, is that right?

A. Yes, Mr. Buckalew; she gave the statement voluntarily, like I said. I didn't have to. She came up with the dates and everything else. At that time she was my witness. She called me.

Q. You asked her about which airline she traveled on, didn't you?

A. Definitely. She told me that——

Q. Mr. Sachen, is it your contention that this complete statement was given to you by Lena Mae Wilkins and you only interposed one or two objections over a period of an hour and a half?

A. I didn't say one or two, Mr. Buckalew. I pointed—I want [155] to bring in this: I asked her if she was correct, if she wanted to give me the statement, or are you sure.

Q. You are not getting the point, Mr. Sachen. I will admit she came up to your office. You testified to that, but what I am——

A. She didn't come to my office.

Q. Well, she sought the officers out?

A. Right.

Q. All right. The only thing I am trying to find out. It took an hour and a half to take the statement. How was it given? Did she just sit down and start talking and this is what she said, or did she; for example, did she say one line, you asked her a question, she say another line, you asked her another question?

A. Usually on signed statements, Mr. Buckalew,

(Testimony of Joseph V. Sachen.)

I asked, "Start from the beginning and tell me exactly what happens." I take the statement down in longhand. And I get everything in there that she wants to tell me.

Q. Now, when do you get the things in the statement that you want in the statement?

A. What she wanted to tell me, because if you look at the preface of that signed statement, you will see where she does not have to give me the signed statement.

Q. I have read that Mr. Sachen. Now, will you look at the statement and see if you can tell me—I'm not trying to embarrass you, I just want to know why you spell night "n-i-t-e." [156] Is there any purpose in that?

A. No, I think you can you can spell night "n-i-t-e" or "n-i-g-h-t."

Mr. Kirkland: I object. I am——

The Court: What is the relevancy, counselor?

Mr. Buckalew: I don't know.

The Court: Well, then——

Mr. Buckalew: I mean, it's got me puzzled.

The Court: Objection sustained. If you don't know——

Q. (By Mr. Buckalew): Now, when you got the statement reduced to writing in this form, did you go over the statement line by line or page by page with Lena Mae Wilkins?

A. I had her read it.

Q. Now, how long did it take her to read it?

A. About ten minutes.

Q. She read it page per page?

(Testimony of Joseph V. Sachen.)

A. She read everything about it, yes, sir.

Q. Did you watch her while she was reading the statement? A. Yes, I did.

Q. How about the phone calls from Kodiak, Alaska? Was that her idea?

A. She gave me that statement voluntarily; just what she said as I put it down in writing.

Q. I'm not asking you whether its voluntary. The question is, did you ask her before she said anything about telephone [157] calls—did you say, "Did you make any telephone calls from Kodiak?"

A. I did not.

Q. Did you ask her any time during this interview if she sent any wires?

A. I don't remember. I don't think so. Just what she said is what I put down.

Q. Then, it's your testimony that you didn't have to prompt her at all?

A. I didn't have to prompt her, Mr. Buckalew.

Q. You didn't interrogate her about which airlines she rode on?

A. I asked her the airlines. When she could, I put that down in the statement.

Q. Did you ask her if she sent letters from Kodiak?

A. I don't remember if I did or not. She came up with the idea just exactly as it's said there. She sent the money to him.

Q. Did you tell her any time during the course of the conversation, "We have got to specify things on this if we are going to get this boy"?

(Testimony of Joseph V. Sachen.)

A. I don't think I ever said that to her. I wouldn't have any reason to say that Lena Mae—I don't think——

Q. You don't know whether you made the statement or not?

A. I am not sure. I know what I did tell. I said, "Lena, I want the truth. That is, I want the truth on it."

Q. Now, whose idea was it to initial the portions in this statement? [158]

A. Mr. Buckalew, any time we take a signed statement, we are instructed if there are any erasures or markovers, that the defendant, or the person who signs the statement, mark initials so that they know that the error is there. That is a procedure that we have in our work.

Q. In other words, that is a demand?

A. That is the way we are taught.

Q. Now, will you look at the statement a second, and I want you to think about this. The first correction in there—as a matter of fact, didn't you point that out to Lena Mae and say, "Insert the word 'I' in there and initial it"?

A. No, I did not. When Lena Mae read that typewritten sheet, she put that in by herself and initialed it by herself. I did not tell her that.

Q. Will you look at the statement and tell me how many more corrections are in the statement?

A. Seven.

Q. It took her ten minutes to read it?

(Testimony of Joseph V. Sachen.)

A. Yes.

Q. She made all those corrections; found them herself? A. As I said, Mr. Buckalew——

Q. Just answer that question. Did she find all those corrections herself?

A. That is right. You—as you see these two here, she put in herself. These two were the dates—she changed the dates [159] herself on that. The misspelling of the word “legitimate” she put her name on there. And the same with “Samuels.”

Q. Mr. Sachen, do you mean that Lena Mae Wilkins checked the spelling of the F.B.I. agent in a statement they intend to introduce into court?

A. Yes, why not.

Q. And each separate correction in there. You didn't point any of them out to Lena Mae Wilkins?

A. No, sir. I did not point out one to Lena Mae Wilkins?

Q. It took her ten minutes to read and correct the statement? A. Approximately.

Q. You don't have your log on that?

A. No, sir.

Q. Have you got a log in your office on it?

A. On her, yes.

Q. I mean—Oh, for example, yesterday, you seemed to have a log on everything. Do you have a log when she made the first correction?

A. When we make hers the——

Q. Just answer the question.

(Testimony of Joseph V. Sachen.)

A. Well, if you let me, I probably can tell you. On this—when I took this thing in longhand, I asked Lena Mae to look at it and see if it was all right—that initial one. So I said, “I am going to have my steno type this up,” and so I brought the one that I had written in longhand and that one, [160] and asked her, “There are two marked identical, like you said this morning. Read them and make your corrections and see if they are right,” and that is the corrections she made.

Q. Now, when you advised Lena Mae Wilkins of her constitutional rights, did you indicate to her that she might get charged with conspiracy when she took this statement? A. No, I didn’t.

Q. Didn’t indicate that to her? A. No.

Q. How long did it take you to advise her of her rights? A. Oh, say a minute or two.

Q. Now, what did you tell her when you advised her of her rights?

A. I told her she did not have to make the statement. I told her any statement she made would be held against her in any court of law; that she has a right of counsel.

Q. That is all you told her?

A. That is all.

Q. Now, the language in the statement—is it your testimony that that is Lena Mae Wilkins’ language?

A. That is how she gave it to me.

(Testimony of Joseph V. Sachen.)

Q. Now, when you took the statement, did you immediately commence to verify it?

A. To verify it, yes.

Q. Did you call Lena Mae back to the office after that?

A. No, she met at that time at the Assistant United States [161] Attorney's Office where Mr. Fitzgerald stated that he would like to have that statement in affidavit form, and Mrs. Wilkins had no objection to it.

Q. Do you have authority to put people under oath? A. Yes, I do.

Mr. Kirkland: Objected to. It's immaterial.

The Court. It may have some relevancy. I don't know at this time. Is that preliminary, counselor?

Mr. Buckalew: Yes, sir.

The Court: Very well. Objection overruled.

Q. (By Mr. Buckalew): Do you have authority to put witnesses under oath?

A. In certain cases, yes, I do.

Q. Do you have authority to put witnesses under oath in this kind of case? A. I'm not sure.

Q. Now, as a matter of fact, Mr. Sachen, you didn't take her down to Mr. Hartlieb's office because you figured this question of drunkenness would come up, did you? I said, "you didn't."

A. Oh, no, that was the decision of Mr. Fitzgerald at that time to have that. That was none of my decision. That was Mr. Fitzgerald's idea to have the signed statement in affidavit form.

(Testimony of Joseph V. Sachen.)

Q. Did you tell Lena Mae after she was up in the office she was [162] at liberty to leave?

A. What office?

Q. Wherever you took the statement. Where did you take this statement?

A. As I previously said, it was taken at the police station.

Q. That is, the City Police Station?

A. Yes, sir.

Q. It wasn't taken in your office?

A. No, sir.

Q. Well, did you proceed from the police station over to your office?

A. No, we never did go to my office.

Q. Was this secretary an F.B.I. secretary?

A. One of our F.B.I. secretaries, yes, sir.

Q. Then, you sent the statement over to your office?

A. No, I didn't send it. I brought it there.

Q. Oh, I see. And had the statement reduced to the present form—typewritten?

A. That is right. Exactly what the written form that I wrote out in long hand.

Q. Now, where was the statement actually signed? A. That statement there, sir?

Q. Yes.

A. That was signed in the Assistant United States Attorney's office, Mr. Fitzgerald's. [163]

Q. I take it that you were present and Mr. Pass was present? A. Yes.

Q. That is, when Lena Mae signed the state-

(Testimony of Joseph V. Sachen.)

ment? A. That is right.

Q. Then she didn't sign the statement in the presence of Judge Hartlieb?

A. The procedure is this, Mr. Buckalew. She was then presented before Mr. Hartlieb to the United States Commissioner, who asked her if the statement was true, the procedure he goes through, and we went with Lena Mae Wilkins down to the United States Commissioner's office and put it in affidavit form, which she swore was true and correct. That was still Mr. Fitzgerald's.

Q. Now, just prior to the time the statement was signed, did you advise her again of her rights?

A. Yes, I'm quite sure I did.

Q. Would your log show whether or not—I will admit it's in the statement. My question is, when she signed it before Mr. Fitzgerald, yourself, and Pass, did you then advise her that she didn't have to make any statement; if she did, it would be used against her?

A. I am quite sure I did. I usually do.

Q. As a matter of practice?

A. That is right.

Q. But you don't remember in this case whether you did or didn't? [164]

A. I'm not quite sure on that.

Q. You permitted a complaint, then, to be signed against Mr. Yokely prior to the time the statement had been verified?

Mr. Kirkland: Object to the question, your

(Testimony of Joseph V. Sachen.)

Honor, Mr. Sachen doesn't permit anything of that nature.

Mr. Buckalew: Excuse me, your Honor.

The Court: Objection sustained. You may rephrase your question.

Q. Were you the moving party in instituting the final files of complaints against James Taylor Yokely prior to the time the statement had been verified?

Mr. Kirkland: Object to that question.

The Court: On what grounds?

Mr. Kirkland: Immaterial, as to who moves—not unless he is trying to contend the F.B.I. agent is trying to frame someone.

The Court: In that respect, objection overruled.

Mr. Buckalew: I object to that statement I am implying the F.B.I. framed anybody, and he knows it.

The Court: The objection is sustained and the jury is instructed not to consider the answer made by counsel and the court instructs counsel at this time not to make any more such statements.

Mr. Buckalew: Your Honor, where were we on the last question?

The Court: The question whether or not he was the moving party, if you will recall. [165]

Q. (By Mr. Buckalew): Can you answer that?

The Court: Better restate it again.

Mr. Buckalew: Would you read the question back, please?

(Testimony of Joseph V. Sachen.)

The Court: I had hoped to save time by you restating it.

Q. The question whether or not you were the moving party that got this complaint filed against James Taylor Yokely prior to the time that the facts of the statement were verified?

A. In other words, you mean if I formed an opinion?

The Court: No.

A. If I did, I presented it after I had the signed statement. I think I can answer it. After I had the signed statement, I presented the facts to Assistant United States Attorney Jim Fitzgerald, who authorized me to sign a complaint against Yokely.

Q. Now, Mr. Sachen, is it true that the facts were based solely on the statement here?

A. I gave the facts. I gave those facts to Mr. Fitzgerald, exactly what's in that statement, yes. These are the facts.

Q. Mr. Sachen, I would like to ask you a few more questions about Mr. Yokely's house?

A. Yes.

Q. Now, did you go into Lena Mae Wilkin's room? A. Yes, I did.

Q. You went into the room and observed her clothes on the floor? [166]

A. That is right. She asked me to come in and observe them.

Q. Now, did you observe anything else in that room?

(Testimony of Joseph V. Sachen.)

A. I only know there was a bed and——

Q. How about a whiskey bottle? Did you observe a whiskey bottle?

A. I think there was, but I'm not sure.

Q. Was there a dresser in there?

A. I think there was, yes.

Q. Wasn't there a whiskey bottle on the dresser?

A. I'm not sure. I didn't observe it that closely. I was more interested in my main duty on that trip. This was to apprehend Mr. Yokely.

Q. Did you see Lena Mae Wilkins take a shot out of the bottle while she was there?

A. No, I didn't see her.

Q. All the time you were in the house, were you in a position where you could keep Lena under surveillance? A. No, I wasn't.

Q. Where is the bathroom with reference to Lena Mae's room?

A. It's down the hall and way at the end of the hall past the kitchen.

Q. Did Lena Mae's room have a lock on it?

A. Didn't have when I got there. She invited me to look at her clothes. The door was open.

Q. You don't know, then, whether the door had a lock or not? A. No, I don't. [167]

Q. There were three bedrooms in that house?

A. I'm quite sure there were three, yes.

Q. Lena Mae Wilkins lived in her own bedroom?

A. That is right.

Q. And——

(Testimony of Joseph V. Sachen.)

A. I don't know if she lived there, but she had a bedroom there.

Q. Were her clothes in that room?

A. Yes, her clothes were in that room.

Q. Did anything else in the house indicate that she lived in any other bedroom?

A. I don't know, I said.

Q. You don't know whether she lived in the other room or not? A. That is right.

Q. Evidence you had indicated she had her own room and lived in it? A. That is right.

Q. Now, where was James Taylor Yokely's room?

A. His room, I think, was the second or third down the hallway on the left, counting from the front entrance.

Q. Were any other occupants in the house?

A. Mary Yokely was in the bedroom there when I came in.

Q. Did Lena——

A. In Yokely's room.

Q. During the course of this statement, didn't Lena Mae advise you that she wanted a room down there? [168]

A. I don't remember, if it's not in that statement.

Q. That wouldn't help the United States out very much if it was in the statement, would it?

A. Are you referring, Mr. Buckalew, that that statement is not true?

Q. No.

(Testimony of Joseph V. Sachen.)

A. I just wanted to know.

Q. Did you cut anything out that Lena Mae said?

A. I didn't cut anything out at that time because Lena Mae was my witness. She called me.

Q. I understand all that: I understand all that. It is your testimony, now, that this statement here—the statement that is now in evidence, that is going to the jury, is Lena Mae's statement, and that she sat down and talked and you wrote it down—what she said?

A. That is right.

Q. And during——

Mr. Plummer: I object to this interrogation. The question's already been asked at least three times, or at least twice, of this witness, and has been answered by this witness.

The Court: The court doesn't know. Threé or four times. That is irrelevant. The objection is sustained.

Mr. Buckalew: Your Honor, I am having a hard time getting anything out of this witness.

The Court: Well, in that respect, counselor, that is [169] one of the problems that always a defend-and counsel runs into, but there is nothing I can do about it. I don't know what to suggest.

Mr. Kirkland: Your Honor, could I make a suggestion?

The Court: No.

Mr. Buckalew: Your Honor, could I approach the bench?

The Court: You may.

(Testimony of Joseph V. Sachen.)

(Thereupon counsel for the defendant, James Taylor Yokely, approached the bench and the following discussion was had.)

Mr. Buckalew: I am sorry to get back on my feet, but I had an appointment with the doctor at noon and he said if I don't get down there—I don't want to tell the jury.

The Court: All right. Fair enough. We will recess at this time. I'd like to recess until 2:15. Have you any objections?

Mr. Dunn: No.

Mr. Plummer: Not at all.

Mr. Kirkland: Do you have any objections when we do come back to let me get the postmaster from Kodiak——

Mr. Buckalew: We don't have any objection to putting the postmaster——

Mr. Kirkland: From Kodiak and Fairbanks so he can get out this afternoon?

Mr. Dunn: No.

The Court: Since Mr. Buckalew isn't feeling well—— [170]

Mr. Buckalew: I'm going to get a shot. I'll be all right.

Defendant Yokely: Your Honor, can I say something?

The Court: No. The court would like to suggest if you have anything to say, you speak to your counsel and that the court then could hear from your counsel in respect thereto.

(Testimony of Joseph V. Sachen.)

The Court: Ladies and Gentlemen of the Jury, it is desirable to continue at this time this case until this afternoon. Mr. Buckalew's not feeling too well so we are going to take a recess until 2:15. Therefore, I must again instruct you not to discuss this case or permit other persons to discuss it with you.

The Court will stand in recess until 2:15.

(Whereupon, at 11:50 o'clock a.m., December 22, 1954, the court continues the cause to 2:15 o'clock p.m., of the same day.)

(At 2:15 o'clock p.m. counsel for plaintiff and counsel for the defendant being present, the trial of said cause was resumed:)

The Court: Will you please call the roll of the jury?

The Clerk: Trial jury is all present, your Honor.

The Court: Mr. Sachen, will you please resume the witness stand.

(Thereupon, the witness resumed the witness stand.) [171]

Mr. Buckalew: Could we have just a minute, your Honor?

The Court: Yes, you may.

(Counsel conferred and thereupon the following proceedings were had:)

Mr. Buckalew: Defense is ready to proceed, your Honor.

(Testimony of Joseph V. Sachen.)

The Court: Very well. You may continue. Mr. Buckalew, you hadn't concluded your cross, had you. At least, you didn't indicate that to the court.

Mr. Buckalew: I was just about finished—I have, your Honor.

The Court: Very well. Mr. Dunn, you may cross-examine.

Q. (By Mr. Dunn): Mr. Sachen, I think you testified on direct that at some place during your contact with the defendant, Wilkins, she got out of your car approximately two blocks from Yokely's house. Is that true? A. About that, yes, sir.

Q. Now, you were taking her from what place at that time? A. From the police station.

Q. That was after she had given you the statement? A. That is right.

Q. Was it prior to the statement being reduced to its present form?

A. The statement was never reduced to its present form.

Q. Well, it must have been reduced to its present form. It's in [172] existence now. Was that prior to the statement being typewritten?

A. That is right. Prior to that, yes.

Q. When you left the police station, did she ask you to take her home?

A. She asked Detective Pass to take her home. Detective Pass did take her in his car down there.

Q. You know why she asked to get out of her car two blocks before she got home?

(Testimony of Joseph V. Sachen.)

A. I think she was discussing that with Detective Pass at that time.

Q. Did you overhear it?

A. I think she was—frightened, I think, would be the main thing.

Q. What? A. She was frightened.

Q. She was frightened?

A. Or she didn't want to be seen. Either one.

Q. Do you know where she went after she got out? A. No, I don't, sir.

Q. Now, did you pick her up later that day?

A. No, she came back.

Q. She returned?

A. She returned to the police station, yes, sir.

Q. Now, you testified yesterday concerning the times at which [173] these various incidents with respect to this statement took place, did you not?

A. Yes, sir.

Q. Now, was the jury out at that time?

The Court: Yes, they were.

A. I think they were, yes.

Q. Will you repeat that testimony, please?

Mr. Kirkland: Excuse me. I wish counsel would ask questions rather than just repeat his testimony of this morning.

The Court: In respect thereto, he is trying to shorten it up. Objection overruled.

Q. (By Mr. Dunn): Please identify the instrument from which you are reading?

A. This is the interview log. We keep this when we take signed statements from anyone. We take

(Testimony of Joseph V. Sachen.)

signed statements; we keep interview time; advise the persons of their rights and what time the statement was completed, and the time she has signed it. We start out first: Interview—Lena Mae Wilkins; Interviewed by—My name and Detective Pass of the Anchorage Police Department; the place was Anchorage Police Department, and date was 9/7/54; Time person interviewed; she was informed that she was not required to make a statement and that any statement she made could be used against her in court at 9:20 a.m. Time person interviewed was advised of rights of counsel was 9:22 a.m. Time interview began was 9:25. Time [174] guilt or participation of crime admitted—9:25. Time oral interview concluded was 9:40. Time preparation of statement commenced longhand or time dictation began to stenographer; that was 9:45, by whom written in longhand or dictated. I put the writer. It is myself. Time statement completed in longhand or time dictation concluded was 10:20, and turned over to the person for interview and reading and signature at 10:20. Person interviewed completed reading statement at 10:30 a.m., and signed at 10:30 a.m. And at the bottom is my name and title.

Q. May I examine that, please?

A. Surely.

Q. I think that would be quicker than my asking you questions on what you testified to.

(Paper was given to counsel for the defendant, Mr. Dunn.)

(Testimony of Joseph V. Sachen.)

Q. Well, now, Mr. Sachen, on this instrument it says, "Time of preparation of statement commenced in longhand or time dictation began to a stenographer—9:45." Well, now, which of those took place at 9:45?

A. That time was taken in longhand, sir.

Q. That is when you started writing it down yourself?

A. That is right.

Q. And then time statement completed in longhand or time dictation concluded—10:20. That 10:20 refers to the time when you yourself finished writing it out in longhand? [175]

A. That is right.

(Statement thereupon was handed back to witness.)

Q. And then the statement was signed by the defendant, Wilkins, at 10:30. Is that right?

A. That is right. I think so.

Q. That is what your log shows?

A. Yes, that is right, sir.

Q. Now, Mr. Sachen, is it your testimony that you have never, at any time, seen the defendant, Wilkins, drunk?

A. No, I have never seen her drunk. No, sir.

Q. Before you began taking this statement from her did you ask her if she was drunk?

A. I might have, but I don't remember, sir.

Q. You think it's likely that you would have forgotten if you had done that?

A. It could have been I smelled liquor on her.

(Testimony of Joseph V. Sachen.)

Q. Did you ask her if she had been drinking?

A. I don't remember that either, sir. I probably did.

Q. You don't remember doing it? A. No.

Q. Do you remember everything she said?

A. In a signed statement.

Q. Yes? A. Yes. I had written it.

Q. Is it fair to state that you remember everything that she [176] said, but you don't remember what you said to her?

A. Well, no, I can't remember everything I said to her.

Q. Now, you stated, I believe, in response to Mr. Kirkland's last question to you on your direct testimony that after taking this signed statement, you contacted the ACS and the Postmaster at Kodiak, did you not?

A. I didn't contact them, no, sir.

Mr. Dunn: May I have the Government's Exhibit 1, please?

(Thereupon Government's Exhibit No. 1 was handed to Mr. Dunn, counsel for the defendant.)

Q. You don't think you testified to that effect, then?

A. I didn't testify that I contacted the ACS of Kodiak. No, I said one of the agents did.

Q. Is it now your testimony that your office, that is, the Office of the Federal Bureau of Investigation subsequent to the taking of this statement, contacted

(Testimony of Joseph V. Sachen.)

the Alaska Communications System and the postal authorities at Kodiak? A. Yes, they did.

Q. The Alaska Communications System in Anchorage? A. Yes.

Q. Also the Alaska Communications System in Kodiak? A. Yes.

Q. Did you contact the postal authorities in Anchorage? Did your office contact the postal authorities in Anchorage?

A. In Anchorage? [177]

Q. Yes. A. No, sir.

Q. Did your office contact telegraph agencies other than the ACS in Anchorage and Kodiak?

A. My office here? I don't think so, no.

Q. Did they contact any postal authority other than the postal authority at Kodiak?

A. I think Kodiak was the only place, yes, sir.

Q. Now, for what purposes were those contacts made?

Mr. Kirkland: Object to its immateriality.

The Court: What is the relevancy, counselor?

Mr. Dunn: Your Honor, the questions are preliminary. I am going to—I am trying to determine what facts in this statement were, if they be facts, were verified.

Mr. Kirkland: If the court please, I will assure him I will introduce that into evidence.

Mr. Dunn: Will you read back to me what Mr. Kirkland said, please? Well, that is certainly counsel's right, your Honor, but it is also my right to see

(Testimony of Joseph V. Sachen.)

what was done in connection with the verification of the statement that this witness elicited from the defendant, Wilkins.

The Court: Objection overruled. You may answer.

Mr. Dunn: You will have to re-read——

Mr. Kirkland: I'd like to interpose objection. The majority of this is actual facts—would be hearsay information [178] that would be elicited from this particular witness.

Mr. Dunn: Well, your Honor——

The Court: He has a right though he is bound by the answer. If he wants to be bound by the answer, that is the rule of evidence. He may do so. That is his prerogative. Objection overruled.

A. They were made to verify the statements that Lena Mae made in her signed statement.

Q. Well now, did your office make any investigation as to whether or not, on April 2, 1954, James Taylor Yokely had any girls working for him?

A. No.

Q. Did your office investigate whether or not Mr. Yokely had a house at 1806 East "I" St. in Anchorage?

A. When was that?

Q. At any time, subsequent to the taking of this statement.

A. I think Mr. Yokely at one time—I wasn't on the case—I think we had another charge against him and I think our office was informed that he lived this way, but as far as I—personally, I don't know. I have never——

(Testimony of Joseph V. Sachen.)

Q. Did you make any investigation, or did your office, of whether or not the defendant, Wilkins, purchased a ticket on Alaska Airlines from Anchorage to Fairbanks? A. Yes.

Q. Did you make any investigation, or did your office, of whether [179] James Yokely received any telephone calls from Kodiak, Alaska? A. Yes.

Q. Did you make any investigation, or did your office, of whether or not James Yokely lived with Lena Mae Wilkins in Fairbanks? A. Yes.

Q. Did you make any investigation of whether or not the defendant, Wilkins, traveled from Fairbanks to Anchorage? A. Yes.

Q. Make any investigation of whether or not, after having so traveled, she spent the night at Yokely's place?

A. We investigated that, yes.

Q. Make any investigation of whether or not, subsequent to that time she took the morning flight to Kodiak, Alaska? A. Yes.

Q. Did you make any investigation as to whether or not the defendant, Wilkins, was in fact in Kodiak, Alaska? A. Yes.

Q. Did you make any investigation as to whether or not there was a registered letter bearing the return address of one, Carl Samuels, mailed from Kodiak, Alaska, and addressed to James Yokely?

A. Yes.

Q. Did your office, or did you contact the Deputy Marshal, [180] Disney, in Kodiak concerning the

(Testimony of Joseph V. Sachen.)

activities of the defendant, Yokely, while she was in Kodiak, if she was, in fact?

A. Verify if she was in Kodiak?

Q. Did you contact the Deputy Marshal with respect to the defendant, Wilkins?

A. Yes, my office did.

Q. Did your office make any attempt to locate an individual by the name of Bill Gordon?

A. Yes.

Q. Did your office make any investigation as to whether or not James Yokely, in May or thereabouts of 1954, went to Portland, Oregon? A. Yes.

Q. Did your office make any investigation as to whether or not Lena Mae Wilkins made \$8,000.00 in the months of June and July, 1954. A. No.

Q. As an F.B.I. agent, Mr. Sachen, are you charged with any duty other than thoroughly investigating a matter to which you are assigned?

Mr. Kirkland: Object to its being immaterial.

Mr. Dunn: Not at all, I am, your Honor—The question is material on its face.

The Court: The court doesn't see it, counselor.

Mr. Dunn: I want to know, your Honor, what an F.B.I. [181] agent sets out to do when he is assigned to a case. I want to know this. If the court please, I want to know whether he sets out to investigate or whether he sets out to build up a case to be prosecuted. That is exactly what I want to know.

The Court: Counselor, what probative value would it have?

(Testimony of Joseph V. Sachen.)

Mr. Dunn: It would show whether or not this witness is a fair, impartial witness or whether or not he is an obviously biased witness.

The Court: In that respect counselor may inquire. Does the Government have to prove if the witness is biased or prejudiced?

Mr. Dunn: No, your Honor, but I have the right to prove if he is, if I can.

The Court: I agree. You have the right as defense counsel to bring out if it is bias or any relationship or any contractual relationship that may exist between his witness to show his interest in the outcome of the lawsuit.

Mr. Dunn: I take it, the question I last asked concerning the duty with which he was charged when he undertakes to investigate a case is certainly relevant as to the question of whether or not this witness is biased.

The Court: In that respect, counselor, don't you think it is the duty and responsibility of all agencies of the United States of America to try to get a conviction if they can? [182]

Mr. Dunn: I certainly do not.

The Court: Very well, you may answer the question, then.

Mr. Buckalew: Your Honor, I think I will have to take exception to His Honor's remark. He prejudicial to both defendants.

The Court: I asked him if he did and I was trying to ascertain what was in the counsel's mind. I didn't make any comments. It was just that I was

(Testimony of Joseph V. Sacken.)

trying to find out what counsel was trying to get at. Now, surely you don't take exception to that, do you, counselor?

Mr. Buckalew: I don't like to take exception to anything the court says.

The Court: You have a right to and also a duty. If by any chance the court is in error——

Mr. Buckalew: That is why I took the exception. I thought His Honor said that the agencies of the United States had a duty to investigate.

The Court: I asked him if he did not feel——

Mr. Buckalew: Is the question directed to counsel?

The Court: That is correct.

Mr. Dunn: I answered it.

The Court: Could counsel admit it?

Mr. Buckalew: I didn't hear counsel's answer.

The Court: Very well, then——

Mr. Kirkland: Excuse me. I would like to interpose an objection. First of all, if counsel is desirous of finding out [183] whether or not this witness is hostile or biased or trying to frame anyone or for any such reason of that under our rules of evidence, to come he should lay the proper foundation. Ask that question. Then, depending on the answer he gets, then to go into that point.

The Court: In that respect I believe counsel has laid the foundation, and the court wanted to ascertain what was in the mind of counsel to justify the question, and I am satisfied now. So therefore, you may answer the question.

(Testimony of Joseph V. Sachen.)

Q. (By Mr. Dunn): Do you remember the question, Mr. Sachen?

A. Yes, I think I do. I can answer it, I think. The duties of the F.B.I. agent are to protect the laws of the United States. He presents all the facts through the U. S. Attorney. No agent makes an opinion. He does give an opinion.

Q. Well, now, is that your answer?

A. That is right.

Q. Well, now, is it, then, your duty, as an F.B.I. agent to investigate for the purpose of eliciting and presenting the truth, the whole truth, and nothing but the truth? A. Right.

Q. That is your duty? A. Yes.

Q. Have you ever been told in the course of your training to——

Mr. Kirkland: Excuse me, your Honor. I object to the [184] immateriality of this. It has no bearing on the issues of the case. It's interesting, but time consuming.

The Court: It may be preliminary. I don't know. Is it preliminary, counsel?

Mr. Dunn: Well, I don't know, your Honor, but I have to object to your sustaining his objection since I haven't asked the question yet. All of these——

The Court: Of course that would be a useless act to do that, counselor.

Mr. Kirkland: Part of it has been asked. It's obvious what the rest is going to be.

The Court: It's anticipatory. Therefore, the

(Testimony of Joseph V. Sachen.)

court will reserve decision until the question is asked. Then you may make the proper objection.

Q. (By Mr. Dunn): Have you ever been instructed in part of your training that a witness, or a person who is giving you a statement, who proves false with respect to parts of his testimony is to be distrusted as to the whole?

Mr. Plummer: I object to the question. His instructions from the Department of Justice are confidential. They have to be given to this witness or anybody else.

The Court: Well, on that ground the court wouldn't sustain your objection, but if you make it on other grounds, the court would. [185]

Mr. Kirkland: Your Honor, I prefer it on the grounds that it is immaterial and irrelevant on the issues being tried before the court.

Q. Do you believe, then, Mr. Sachen——

Mr. Kirkland: Object on the grounds it is immaterial, irrelevant, and what the witness believes has nothing to do with what the witness believes.

The Court: Objection sustained, Mr. Dunn. It is a question of fact for the jury to determine whether or not the statement obtained from the defendant, Wilkins, was obtained in the sense it has any probative value, they must determine its question of fact and not his training. It has nothing to do with the admissibility or inadmissibility of the document, nor what weight they should give to it.

Mr. Dunn: I'd like to suggest, your Honor, that the questions as to this gentleman's training were

(Testimony of Joseph V. Sachen.)

preliminary merely to establishing the conditions under which the statement itself was taken. Now, the conditions under which the statement itself was taken certainly are not irrelevant.

The Court: In that respect, though, Mr. Dunn, haven't they been pretty well brought out. Would that be proper rebuttal on your part or your case in chief. If there is something irregular, assuming that there may be, the court doesn't say there is or there isn't.

Mr. Dunn: Your Honor, I don't feel I am limited on cross-examination to a scope more narrow than that of the direct [186] and Mr. Kirkland brought out on direct so much as he wanted of how the statement was taken.

The Court: I agree with counsel.

Mr. Kirkland: If the court please, I wouldn't object to his questions about how the statement was taken. That I have no objection to whatsoever.

Mr. Dunn: He doesn't have any objection to my question. He just objects to the fact I am going to ask a question.

The Court: In that respect, Mr. Dunn, I point out to you, you have gone into the training and education of the witness here, which I don't think is relevant and material to this particular case, nor can that in any way affect the ultimate outcome of this case. Now I agree with you, you have the right to go into any ramification of the procuring and submission of the statement, but as to his—what his

(Testimony of Joseph V. Sachen.)

instructions are, what he wasn't instructed to do, I don't believe that is material.

Mr. Dunn: The court so rules.

Q. (By Mr. Dunn): Mr. Sachen, did you ever have a conversation with any person who has testified during the course of this trial concerning the events which took place at the time you arrested Yokely, that conversation taking place after—several days probably after the arrest was made?

A. I might have. I don't remember.

Q. Might you remember who the person [187] was? A. No.

Q. Are you acquainted with a man, Richard Burge? A. Yes.

Q. Does that question refresh your memory?

A. Yes, it does.

Q. Will you tell the court the substance of that conversation?

The Court: Would you please state the time and place approximately.

A. On this I don't remember exactly—the exact date, but it was going out the post office building here, and Mr. Burge asked me some question. What I don't remember. He said he made a point to me. I don't remember the question—the questions that he asked me, and I said to him any law enforcement officer would have shot—I think I put it this way: would have shot Yokely for what he did to Lena Mae Wilkins that afternoon that I was there. I think that was the general gist of it. I don't remem-

(Testimony of Joseph V. Sachen.)

her exactly. I made the point that I just held him and handcuffed him and put him in the car.

Q. You remember anything else you said to Mr. Burge at that time?

A. No, I don't remember anything else that I said to Mr. Burge at that time.

Q. Do you think that what you just stated you said to Richard Burge is a more accurate recital of what you said to him than the following statement: "I should have put a bullet through [188] your friend's head"?

A. No, I don't think I said, "Put a bullet through his head." I think I said, likely said, "He should have been shot," or I might have said, "Any other law enforcement officer would have put a bullet through his head," or "shot him," either one way or the other. I am not quite sure.

Q. Did you also say to Mr. Burge at that time that the F.B.I. does not protect criminals?

A. I don't think I said that. If I did, I don't know.

Q. Does that statement sound at all familiar to you. Does it even faintly ring a bell?

A. No, it doesn't.

Mr. Kirkland: I object to any further on the grounds it's immaterial.

The Court: Well, I think counsel has a right to go in to ascertain the attitude of this witness towards any of the defendants, show who is biased or prejudiced, if any. He has, and I think that is the

(Testimony of Joseph V. Sachen.)

purpose of examination. Therefore, the objection will be overruled.

Mr. Kirkland: I submit to the court—First of all, to lay the foundation, he would have to ask the witness one way or the other before that would become proper.

The Court: In that respect, I think technically Mr. Dunn was not proper, but he complied with the spirit of the intent. [189]

Q. (By Mr. Dunn): Now, didn't you testify on direct examination, Mr. Sachen, that after Yokely hit Lena Mae you stepped around and grabbed him? A. Yes, I did.

Q. You put handcuffs on him? A. Yes.

Q. You put him in the car? A. Right.

Q. Did you obtain any bruises or any marks of violence upon your person during the placing of handcuffs on Yokely?

A. No, I don't think I did.

Q. Did you have very much trouble doing it?

A. No, I didn't.

Mr. Dunn: I would like to ask Mr. Sachen to leave the stand, please.

(Thereupon, the witness left the stand.)

Mr. Dunn: May I approach the bench, your Honor?

The Court: You may.

(Thereupon, counsel for the defendant, Lena May Wilkins, approached the bench and the following discussion was had:)

Mr. Dunn: You ruled, your Honor, that I cannot ask any further questions concerning the training of an F.B.I. agent. I want to ask another question. I didn't want to violate the court ruling. That is the reason I asked to approach the bench. I want to ask this witness for the purpose of showing bias and prejudice [190] and utter cooperation with the prosecution, and equal antagonism to the defense whether or not in the course of his training, he was taught to listen to conversations at the time counsel approaches the bench when he is a witness on the stand is the reason I asked him to leave the stand. Now——

Mr. Kirkland: Wish to ask him what?

The Court: Read it back.

Mr. Plummer: Highly improper.

Mr. Kirkland: Object, I object.

The Court: What are your grounds?

Mr. Kirkland: My grounds are it's completely immaterial and irrelevant what his training was, what he was instructed to or not to do have nothing to do with hostility toward any defendant whatsoever, and nothing to the trial—irrelevant testimony; that it is immaterial testimony and further, that——

Mr. Plummer: He was instructed by the court to sit in that chair and not be released from the witness stand as yet and the first time he's been released is when you just did it.

The Court: One at a time.

Mr. Kirkland: Further, in the event—assuming that he were, which the Government absolutely does not admit and denies that it would be confidential

and of a matter required to be kept confidential, which are the rules and regulations of the Department of Justice, F.B.I.

Mr. Dunn: Your Honor, when we claim that privilege you [191] can rule on it at that time. If it's part of the training, it certainly is pertinent to show whether or not he's decidedly favored one side over the other and that his testimony would be treated accordingly.

The Court: Well, in that respect, counselor, I suggest you ask him.

Mr. Dunn: I want to ask him.

The Court: Would you ask him whether or not he favors one side over the other. The question asked is highly improper, highly prejudicial.

Mr. Dunn: Your Honor, if he is trained—if the whole course of his training is to be against the defense, that is a proper matter for the jury to consider in deciding what weight is to be given his testimony.

The Court: Excepting this, counselor, I point out to you, the question you asked is one of argument. You may argue at the conclusion of the trial. Did you notice the witness, Sachen, during the course of the trial, he listened to all the conversation. It's a question of argument.

Mr. Dunn: But I can't argue that. He was fully trained to do that unless that part of the training is in evidence, I can only comment on the evidence in argument.

Mr. Plummer: Your Honor, may I be heard. Mr. Sachen was ordered to sit on the witness stand.

The Court: That is unimportant from that viewpoint. [192]

Mr. Plummer: What should he do, your Honor?

The Court: Counsel is more or less arguing something that is not in evidence.

Mr. Dunn: I don't want to ask him whether or not he overheard. I want to ask him whether or not he was trained to deliberately listen.

The Court: I think that would be highly prejudicial and improper. I think you may ask him the question whether or not he does favor the Government over counsel.

Mr. Buckalew: Who wants to ask that question?

The Court: And the other question along about the same thing, but I think——

Mr. Dunn: May I ask him whether or not he did in fact listen, not whether he was so trained?

The Court: I have no objection to that because——

Mr. Kirkland: I object on the ground it's immaterial. What difference does it make. It's not supposed to be out of hearing of only the jury.

The Court: In that respect, counsel is making a point of it. I concede what you say, but if counsel wants to ask that question, I see no harm and I think he is right if he wants to in respect thereto.

Mr. Dunn: I contend it's relevant toward showing bias. Again I want the record to so show——

The Court: That is a matter of opinion, Mr. Dunn, it's [193] argumentative.

Mr. Kirkland: Am I allowed to object now, or is he allowed to ask the question?

(Testimony of Joseph V. Sachen.)

The Court: I think what you better do for your own sake is object now. I will overrule it. So, it won't be any question on that basis.

(Thereupon, the witness, Mr. Sachen, resumes the witness stand.)

Q. (By Mr. Dunn): Mr. Sachen, during the time that you have been a witness in this case, sitting where you are sitting now, have you deliberately listened to conferences between counsel and the bench, when counsel approached the bench?

A. At times I have, but I haven't paid too much attention to it.

Q. You did it deliberately, but you didn't pay too much attention. Is that your testimony?

A. I said I have listened to it. Yes, I have listened to testimony when counsel came up to the bench.

Q. Did you deliberately listen?

A. Deliberately—Yes, I'm quite sure. Yes, I have.

Q. But you didn't pay too much attention?

A. Yes.

Q. Now, did you read the typewritten statement which is Plaintiff's Exhibit 1, Government Exhibit 1, before you allowed the defendant, Wilkins to read it? [194]

A. Yes, I read it over. Yes.

Q. Now, didn't you testify that all of the changes made on Plaintiff's Exhibit 1 were made at the suggestion of the defendant, Wilkins?

(Testimony of Joseph V. Sachen.)

A. That is right, all but those that were erasures or typewritten errors in there.

Q. You didn't feel it necessary to correct those?

A. I did some, or corrected there on that Exhibit "A" there.

Q. You felt it necessary to correct some and not the others?

A. All those that I saw right at that time, yes, but she did all the corrections as far as the rest of that signed statement is concerned without my asking her to.

Q. Did you feel it necessary to correct all of them that you saw or to have them corrected?

A. The only ones that I corrected were those that were typographical errors.

Q. Irrespective of the nature of the error, did you feel it necessary to correct or have corrected all of the errors that you saw in the statement?

A. That is right.

Q. You did? A. Yes.

Q. Did you notice that there's at least one error on that statement that is underlined that is not corrected—a typewritten error? [195]

A. Yes. Let me explain that to you, counsel. When that statement was written in longhand that underlined word means that that was misspelled and it was not a typographical error. It was misspelled in the longhand.

Q. May I see that exhibit again, please? (Exhibit was handed to counsel.) This is your longhand writing that you are talking about?

(Testimony of Joseph V. Sachen.)

A. That is right.

Q. "I have also been advised," and I am reading from Plaintiff's Exhibit 1, "that I may be represented by a lawyer," and it's your testimony that you misspelled the word "been"?

A. That is right.

Q. Did you give the longhand statement to an F. B. I. stenographer to copy or did you dictate it?

A. I gave it to her to copy.

Q. Then, that statement is in your words, is it not? A. In my words?

Q. That is my question?

A. No, sir. That was the statement that Lena Mae gave to me and I wrote it in longhand, and gave it back to her and asked her if everything there was correct?

Q. But, is it not true, Mr. Sachen, that that statement as it exists is as you wrote it down?

A. By Mrs. Wilkins instructions. She told me.

Q. Is it not true, Mr. Sachen, that that statement as it now [196] exists, is as you wrote it down?

Mr. Kirkland: Object to it, your Honor. The witness has answered the question.

Mr. Dunn: He hasn't answered it, your Honor.

The Court: In that respect it's argumentative, counselor. The witness testified on direct examination for Mr. Kirkland; has testified on cross-examination for Mr. Buckalew, and now you are going into it for the third time. I think it's repetitious;

(Testimony of Joseph V. Sachen.)

therefore, the objection will be sustained. It's a question of fact for the jury to determine as to what is in that statement, based upon his testimony.

Mr. Dunn: The best way for the jury to determine the fact, your Honor, is for the jury to have the facts. The best way to get them is to have the statement.

The Court: That is. And they have already heard it, I think, three times.

Q. (By Mr. Dunn): Now, you testified, did you not, Mr. Sachen, that it took you approximately an hour and a half to write this statement in long-land?

A. I said between an hour and an hour and a half. I was making a guess on that.

Q. You used the word "approximately"?

A. Yes.

Q. Well, now, during that period of time, did you notice any [197] change in the attitude of the defendant, Wilkins? Did she become increasingly jumpy or did she remain placid, calm herself?

A. Just herself all the way through on the statement.

Q. Calm? A. That is right.

Q. She say anything to you about needing a drink?

A. She might have. I don't remember.

Q. Now, Mr. Sachen, I am addressing this question to you personally, not in your status as F.B.I. agent. I want you to divorce the two if you possibly

(Testimony of Joseph V. Sachen.)

can, and the question is this: Do you very deeply want these two people to be convicted?

Mr. Kirkland: Your Honor, I should probably object, but I'd like to hear the answer.

Mr. Dunn: So would I, your Honor, that is why I ask the question.

The Court: There being no objection, he may answer.

Mr. Kirkland: Your Honor, he is assuming the witness for his purposes. He's vouching as to the credibility; then he opens the door for me, I think, counsel.

Mr. Dunn: No doubt in my mind but what Mr. Kirkland gave me every advantage, your Honor.

The Court: Mr. Kirkland, we have to assume that counsel for the defendant knows what he's doing. I don't think it's your [198] job to try to ascertain that fact.

Witness Sachen: Say that question once more.

Mr. Dunn: Read it to him.

(Thereupon, the reporter read the question on line 9, of the previous page.)

A. Counsel, it does not make any matter to me whether they are convicted or not.

Q. You don't care?

A. Truly, that is up to the jury here.

Q. I know that.

A. I presented the facts as my job is laid to me. I present the facts as I see them, as truthfully as I can. I give them to the U. S. Attorney, and he

(Testimony of Joseph V. Sachen.)

makes the opinions in all our cases. As to me, I am sworn to protect the laws of the United States and do not form an opinion. Does that answer your question?

Q. You are not sworn not to have desires, are you? A. No.

Q. Then, is your answer to my question——

The Court: He answered the question, counselor. I think you are going far afield if you go any further than that.

Mr. Dunn: All right, your Honor.

Q. Well, isn't it true, Mr. Sachen, that you personally, possibly as an F.B.I. agent—now, I'm no longer divorcing the man from the job—got the two back together. Isn't it true [199] that you personally urged the District Attorney's office to take steps to bring the present indictment into being?

A. No, sir.

Q. You did not? A. I did not.

Q. You didn't cooperate with them fully?

A. Oh, yes, they're my bosses. By the way——

Mr. Kirkland: He is arguing with the witness and there's certainly a difference between cooperating and urging.

The Court: Objection sustained. Highly improper.

Q. Isn't it true, and do you not know of your own personal knowledge—I will rephrase that question.

Do you know whether or not, subsequent to the

(Testimony of Joseph V. Sachen.)

taking of that statement by yourself, that the defendant Wilkins denied the truth of it?

A. I can't follow you there, counsel.

Q. Do you know whether or not the defendant, Wilkins, denied the truth of that statement after she gave it to you?

A. She never did deny the truth to me of that statement.

Q. Did she ever deny it that you know of?

A. Not that I know of, no.

Q. Not that you know? A. No.

Q. You're certain? A. Certain. [200]

Q. Is it, or is it not true, that your office is prepared, in the event of an acquittal here to proceed with another indictment against these same defendants?

Mr. Kirkland: Object to the question, your Honor, as highly immaterial and irrelevant. That decision lies with the United States Attorney's Office.

The Court: Objection sustained.

Mr. Kirkland: Counsel knows that also.

Mr. Dunn: I didn't ask about the United States Attorney's Office, your Honor.

The Court: I know. Objection sustained. The court feels it's improper. We are trying one case at a time. That is all we are concerned with, is this case at this time.

Q. (By Mr. Dunn): Now, Mr. Sachen, you testified that you smelled liquor on the defendant Wilkins' breath at the time she was giving you the

(Testimony of Joseph V. Sachen.)

statement, did you not? A. That is right, sir.

Q. And how far away was she from you at that time?

A. I said that once before, and that is, I'd say about two feet, sir.

Q. And you could smell it two feet away?

A. That is right.

Q. Now, most of these questions are going to be repetitious for you, Mr. Sachen. [201]

A. That is all right.

Mr. Kirkland: I am going to object to them then—most of these questions.

The Court: Objection overruled because these questions were asked before the court and not before the jury. The jury has a right.

Mr. Kirkland: Oh, I thought in repetition of what Mr. Buckalew had asked.

Mr. Dunn: All right. Now——

Mr. Kirkland: Go ahead.

Q. Now, at the time you were taking this statement from the defendant, what was her general appearance?

A. It looked like she was drinking and disheveled.

Q. Disheveled?

A. Disheveled, that is it, yes.

Q. No doubt in your mind about that. You don't want to think about it any longer or anything?

The Court: Counsel, he answered the question.

Mr. Dunn: I just asked him another one, your Honor.

(Testimony of Joseph V. Sachen.)

The Court: Excepting, it's repetitious, time-consuming.

Mr. Dunn: I didn't think it was repetitious.

The Court: You asked what the appearance of the defendant, Wilkins, was and he said that she had looked disheveled been drinking and disheveled. Then you asked, "You don't want to consider it longer, do you?" [202]

Mr. Dunn: Ask him whether or not there was any doubt in his mind about it?

The Court: In that you are bound by his answer. He said he was, so why be argumentative about an answer that is apparently in your favor.

Q. At the time you took the statement from her, did you ask her what she had been doing all night?

A. No, I didn't.

Q. Did you ask her how much she'd had to drink? A. I don't think I did.

Q. You don't think you did? A. No.

Q. Whose pen did Lena Mae use to sign that statement? A. I think it was my pen.

Q. Pretty good pen?

A. Yes, it was a very good pen.

Q. Parker 51, if I remember correctly?

A. Right.

Q. Did she give it back? A. Yes.

Q. Now, did you not testify previously that you did not hear Judge Hartlieb, the United States Commissioner, ask the defendant, Wilkins, whether or not she was drunk?

A. That is right. I did not hear.

(Testimony of Joseph V. Sachen.)

Q. Now, speaking of the time when the defendant, Wilkins, [203] yourself, Mr. Fitzgerald from the District Attorney's Office, and I believe, Officer Pass, were before the United States Commissioner, how far were you from the defendant, Wilkins?

A. At the Commissioner's Office where she made the affidavit?

Q. Yes.

A. Oh, about four feet—three or four feet, approximately that.

Q. Then you would be in position, would you not, to hear anything that Judge Hartlieb would say?

A. Yes, I would.

Q. You think you heard everything he said?

A. No, I don't think I did.

Q. But you were in a position to? A. Yes.

Q. You weren't deliberately listening to him?

A. Right.

Q. Well—now then, at the time that Lena Mae gave you this statement, and particularly at the time she signed it, was she an exceptionally angry woman? A. No, sir.

Q. She was not? A. No, sir.

Q. Did she seem appreciably aggravated or upset?

A. Oh, I think she was upset, but not appreciably, no.

Q. Repeating an old question again. Would you say that her [204] aggravation and the degree to which she was upset was immeasurable?

A. Yes.

(Testimony of Joseph V. Sachen.)

Q. Scarcely noticeable? A. That is right.

Q. Are you an expert? A. No, I am not.

Q. At observing abnormal behavior in an individual? A. No, I am not, sir.

Q. Are you an expert in deciding whether or not an individual is drunk? A. No, I am not, sir.

Mr. Kirkland: Your Honor, I object to any further questions along those lines. I don't want to hide anything, but everything is time-consuming and I must object.

The Court: In that respect, counselor, this is cross-examination and many of these questions were brought out before the court. The jury has the right to hear on cross-examination everything that was brought out before the court concerning the admissibility of evidence, and although it is time-consuming and a bit repetitious, the court must see that the defendant gets a fair trial. That is the position the court takes.

Mr. Dunn: Your Honor, I know that I am not asking them all. I am culling it down.

The Court: Let's proceed then, please. [205]

Mr. Dunn: What was the last question I asked the witness?

The Court: Asked him whether or not he was an expert on a person being drunk.

Q. (By Mr. Dunn): You said you were not?

A. That is right, sir.

Q. Well, now, you testified that Lena Mae was not drunk. A. That is right, sir.

Q. Then, it is true, is it not, that that is at best

(Testimony of Joseph V. Sachen.)

an inexpert's opinion? A. That is right.

Q. That is true? A. Yes.

Q. Now, did Mr. Kirkland warn you that I had ordered a transcript of your previous testimony and tell you how to answer the questions that I would ask you? A. No, sir.

Mr. Kirkland: Object to the form of the question.

The Court: In what respect, counselor?

Mr. Kirkland: Counsel says, did I warn him. I suggest if counsel wants to go into such information as that, he call myself.

Mr. Dunn: I would enjoy it, your Honor.

Mr. Kirkland: I will submit to it.

The Court: This is cross-examination and I think that [206] it may be a proper subject. Therefore, objection is overruled. It's already been answered.

Mr. Dunn: No further questions, your Honor.

The Court: Any redirect, counsel?

Mr. Kirkland: Yes, your Honor.

The Court: You may inquire.

Mr. Kirkland: Before I ask the first question—counsel is through now, for his cross of this witness?

The Court: Yes. You have him on redirect.

Redirect Examination

By Mr. Kirkland:

Q. Mr. Sachen, it appears as though counsel offered it; however, you advised me of a discrepancy in your testimony which was accidental that you were desirous of correcting. Is that not true?

(Testimony of Joseph V. Sachen.)

A. That is right.

Q. And will you tell the court and jury as to where that discrepancy was?

A. On signing this statement, right here on Exhibit "A," when she signed it in our office. Number 2 is when Mr. Pass handed Yokely the warrant for his arrest, I stated to him that it was a white slave traffic act, and we have a complaint [207] and warrant issued for him; that he's arrested for transporting a woman from Anchorage to Fairbanks and Fairbanks to Kodiak, on two counts.

Mr. Dunn: Move to strike the answer of the witness, your Honor, on the ground it is not proper redirect examination. It is cross-examination.

The Court: Objection overruled.

Q. (By Mr. Kirkland): Mr. Sachen, what did the defendant, Yokely have in his hand, if anything, when you arrested him at his home?

A. Well, now, when I knocked at the bathroom door and I told Yokely I was the F.B.I. agent, he came out. He came out with a razor in his hand, and he asked me——

Q. Excuse me, Mr. Sachen. I will ask you the next question. Now, I believe in response to Mr. Dunn's testimony, you stated that you did not have any trouble taking the defendant Yokely into custody. Is that correct? A. That is right.

Q. You were a football player?

Mr. Buckalew: Objection.

The Court: Objection sustained. If you want to know, ask him his height and weight.

(Testimony of Joseph V. Sachen.)

Mr. Kirkland: Well, the jury can observe that. The question is his having trouble arresting the defendant.

Mr. Buckalew: Object to that. He said he didn't have [208] any trouble arresting him. Counsel is testifying.

The Court: That is correct. Objection sustained.

Mr. Kirkland: Excuse me. If the court please, I would oppose it. Now, we have two counsel here. I suppose Mr. Dunn was binding both counsel here when he was going into these questions at that time. He was assuming the witness when he got beyond the scope of direct. As his own he opened the direct.

The Court: Of course, that is why you have the right of redirect. You may ask that, but that is the chance that counsel for co-defendants takes and they haven't objected, I don't think, to your question, excepting the one question to which the court had to sustain it because it's irrelevant and immaterial; as, "football player"; that hasn't any relevancy to it. Is there any recross?

Mr. Kirkland: I am not through.

The Court: Oh, I beg your pardon. I thought you were through.

Mr. Kirkland: No further redirect examination.

The Court: Any recross?

(Testimony of Joseph V. Sachen.)

Recross-Examination

By Mr. Buckalew:

Q. Mr. Sachen, do you remember that Mr. Yokely came out of the bathroom with soap [209] on his face? A. No, he did not.

Q. You want to think about that a minute?

Mr. Kirkland: Object.

A. I have thought about it.

Mr. Kirkland: The witness has answered. Object to it.

The Court: Objection sustained.

Q. Now, Mr. Sachen, as a matter of fact, did Mr. Yokely leave the razor in the bathroom?

A. No.

Q. You took it away from him? A. No.

Mr. Buckalew: No further questions.

The Court: Any further questions, Mr. Dunn?

Mr. Dunn: No, your Honor.

The Court: Very well. You may be excused.

(Thereupon, the witness was excused and left the stand.)

The Court: I point out to both counsel that the court must adjourn at 4:30 today because of other business before the court, so the court will stand in recess for ten minutes. Recessed at 3:32 o'clock p.m.

(Whereupon at 3:42 o'clock p.m., December 22, 1954, court reconvenes, following a 10-minute recess, the jury having been recalled to

the jury box, and the following proceedings were [210] had:)

The Court: Let the record show all the jurors are back and present in the box. You may call your next witness.

Mr. Kirkland: I would like to call Mr. M. L. Briggs.

The Court: Mr. Briggs may come forward.

MAURICE L. BRIGGS

called as a witness on behalf of the Government, and being first duly sworn, testifies as follows:

The Court: You may proceed, counselor.

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir.

A. Maurice L. Briggs.

Q. M-a-u-r-i-c-e L. B-r-i-g-g-s? A. Right.

Q. Your occupation, sir? A. Postmaster.

Q. Where? A. Kodiak, Alaska.

Q. And do you have with you your records pertaining to a registered letter, I believe it is your registry No. 1813? A. I have.

Q. Will you tell me what that registry is?

A. I am unable to give that information on account of privacy of [211] post office affairs connected with the mails without an order from the court to do so.

Q. And I believe your postal regulations provide that it is permissible to testify to that information

(Testimony of Maurice L. Briggs.)

if the court directs you to. You have a copy of it, sir.

A. That is right.

Q. Might I see it. (Handed to counsel for the plaintiff.)

Mr. Kirkland: If the court please, could I just submit a copy of this to His Honor to read the regulations.

Mr. Buckalew: Your Honor, could defense counsel look at it?

The Court: Yes, you may. (Copy handed to the court.) To save the court's time, could you advise the court which one?

A. Top of the page, to the left.

The Court: May I point out to you—Mr. Buckalew, would you please come forward and I will show it to you.

Mr. Buckalew: I wanted my co-counsel to look at it, too. (Document handed to Mr. Buckalew.)

The Court: What position do you take Mr. Buckalew; Mr. Dunn?

Mr. Buckalew: We haven't had a chance to examine it thoroughly, your Honor.

Mr. Kirkland: While they're examining it—it's a matter of law and I request the court to direct the witness to answer the question. [212]

Mr. Dunn: Your Honor, that is rather premature. We haven't had a chance to examine the regulation.

The Court: Very well.

Mr. Kirkland: If the court please, while he's examining the regulation, I'd like to point out to

(Testimony of Maurice L. Briggs.)

the court, the only person who would be authorized to object to any such testimony would be the legal counsel for the United States Government, which is the United States Attorney's Office. Defense counsel could not interpose objection.

The Court: Well, but the court wants to be fair with counsel. What is your position, Mr. Dunn?

Mr. Dunn: It seems to be proper, your Honor, that counsel approach the bench and that the Government make an offer of proof prior to the court's ruling. I don't see how the court would know the proper priority of his ruling until the court first knew what counsel proposes to prove.

The Court: Excepting this, that the Government doesn't have to do that, do they?

Mr. Dunn: No, I meant it's merely a suggestion to the court.

The Court: Well, the court's been through this before. It's the opinion of the court that this witness should be directed and the court does hereby direct you to open your books to that effect to evidence what information counsel for the Government does want to elicit from you. [213]

Q. (By Mr. Kirkland): Mr. Briggs, you do have the receipt for Registry No. 1813?

A. 1813?

Q. Yes, I believe that is it.

A. Yes, sir.

Q. And to whom was that addressed to, sir?

A. Addressed to James Yokely, General Delivery, Anchorage.

(Testimony of Maurice L. Briggs.)

Q. And what was the return address to that?

A. Carl Samuels, General Delivery, Kodiak.

The Court: Is it Carl or—Mr. Briggs, I didn't get that.

A. Carl.

The Court: Thank you.

Q. And was that insured, sir?

A. I beg your pardon?

Q. Was that insured? A. A register?

Q. Yes, sir. A. Yes.

Q. Now, for how much was it insured?

A. It was registered for a \$100. There is a difference between insured and registry of mail.

Q. I apologize, sir. I am not familiar with your terms. Might I examine that please, sir?

The Court: You may. (Given to Mr. Kirkland.)

Mr. Kirkland: If the court please, I'd like to show this to counsel and offer it into evidence?

The Court: Well—very well, you may show it to counsel. It's difficult to offer that in evidence without offering the rest of the book and I do feel that is proper. I wonder if you couldn't get an exact certified copy of this and I am sure counsel would stipulate to that. I don't think Mr. Briggs would want to leave the book here.

A. No, it is impossible.

Mr. Buckalew: Your Honor, this stage of the proceedings the defense objects to as proper foundation has not been laid. We don't know, for example, who prepared the receipt.

The Court: I think you should. Objection is well

(Testimony of Maurice L. Briggs.)

taken. You should lay a better foundation in that respect.

Mr. Buckalew: We don't know who had custody of the book prior to the time it got to the court room.

The Court: Well, I have sustained your objection.

Q. (By Mr. Kirkland): Sir, are those the final records of the Kodiak Post Office Department?

A. I beg your pardon?

Q. Is this book part of your official records of your postal department at Kodiak, Alaska?

A. That is correct.

Q. And you are the postmaster at Kodiak? [215]

A. Yes, sir.

Q. Thank you, sir.

The Court: Well, counsel failed to ask whether or not those are the books that are kept in the regular course of business; who filled out the receipt. I think that counsel for the defense are entitled to know that, Mr. Kirkland. Is this the book that is used and kept in the ordinary course of post office business? You haven't asked it. Records——

Mr. Kirkland: Very well. I thought the official records were sufficient.

Q. Is this the book that is kept in your ordinary course of postal business in Kodiak?

A. Yes, sir. That is the record that is made at the time of the registration and that is kept in the office as a matter of record for several years.

(Testimony of Maurice L. Briggs.)

The Court: Mr. Briggs, who prepared that receipt for the registry?

A. That particular register was handled by a clerk in the post office.

The Court: And is she an employee of the post office?

A. Correct.

The Court: And she works under your jurisdiction and supervision?

A. That is right.

The Court: This entry was made in the ordinary course [216] of business? A. That is right.

The Court: Mr. Dunn—Mr. Buckalew, wouldn't you stipulate that an exact certified copy of that may be——

Mr. Buckalew: To save time, we would, your Honor. Let me check.

The Court: Very well. * * * You have any objection now?

Mr. Buckalew: I do not.

The Court: There being no objection, it is stipulated by counsel that an exact certified copy of this particular one may be prepared and submitted. What is the date on that, counselor, please?

The Clerk: The date on the top is 4-19-54.

The Court: Thank you very much.

Mr. Dunn: Your Honor, I want no question to arise later concerning this stipulation. Now, we have no objection to a copy being submitted. In other words, we are willing to substitute a true copy

(Testimony of Maurice L. Briggs.)

for the original, but we are not stipulating that either the original or the copy is admissible.

The Court: That is right. The court understands that and you are not binding yourself in that respect. I think what you better do is have an exact certified copy prepared by the District Attorney's Office. They, in turn, can submit it to the attorneys for the defendant. Then, at that time it may be offered. [217]

The Clerk: It shouldn't be offered.

The Court: No, I don't think so because it is an official document of Mr. Briggs. Any more questions, Mr. Kirkland?

Mr. Kirkland: No further direct.

The Court: Do you have any cross, Mr. Buckalew?

Mr. Buckalew: I don't have any, your Honor.

The Court: Mr. Dunn?

Cross-Examination

By Mr. Dunn:

Q. What was the name of the clerk who prepared this particular receipt?

A. Mrs. Getty Briggs.

Q. How long has she been with the Post Office Department? A. About ten years.

Q. Was she steadily employed all that time?

A. That is correct.

Q. What do you call that—a receipt, is that what it is? A. That is correct.

(Testimony of Maurice L. Briggs.)

Q. That receipt shows that a fee of 85 cents was paid. Do you know who paid that fee?

A. The party who registered the letter would pay the fee.

Q. Well, who was the party that registered the letter; that is, [218] the party who paid the fee?

A. That would be the party who paid the fee.

Q. Then, who is that party? Who was it?

A. I didn't register the letter myself and the return address says, Carl Samuels.

Q. Is your answer to my question that you don't know?

A. That is about as direct an answer as I can give you, is what I have already have given. I would have to take the word of someone else or take the word of the—or the record of the return address.

Q. I'm simply trying to get this as accurately as I can, Mr. Briggs. Now is this your testimony. The receipt shows that Carl Samuels brought that letter to the Post Office Department?

A. Not necessarily.

Q. It does not, and somebody besides Carl Samuels may have brought that to the post office?

A. Someone might have registered that letter and mailed it for another party.

Q. And who in fact mailed it. It is in fact unknown to you. Is that true?

A. That is correct. I personally do not know.

Q. As far as you know anybody in Kodiak could have mailed that letter?

A. I didn't see it mailed. [219]

(Testimony of Maurice L. Briggs.)

Q. Answer my question, yes or no.

The Court: Argumentative, counsel—time-consuming and obviously already answered. He doesn't know who mailed it.

Q. Are post offices, Mr. Briggs, classified as first-class, second-class, and so on?

Mr. Kirkland: I object to that, your Honor.

The Court: What is the relevancy, counselor?

Mr. Dunn: It is preliminary, your Honor. I am trying to find out whether or not the post office—it is preliminary to discovering whether or not the post office at Kodiak is a post office which may be governed by postal regulations to the effect that the postal authorities are required to determine who accepted a registered letter.

The Court: Would you just ask him, then. Ask him direct to save time.

Q. Under the regulations governing the post office at Kodiak, are the postal employees charged with discovering who sends a registered letter?

A. We are not required that identity be furnished.

Mr. Dunn: No further questions.

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: May this witness be excused to return home?

Mr. Kirkland: As far as the Government is concerned. I think Mr. Plummer is having a copy made

of this. Possibly he [220] should remain here until we get it; otherwise, we might have——

The Court: I am sure he will do that. He wouldn't go home without it. Mr. Dunn, Mr. Buckalew, do you excuse this witness so he may return home?

Mr. Buckalew: As far as I am concerned.

Mr. Dunn: Yes, sir.

The Court: Thank you for coming, Mr. Briggs. You may call your next witness. Let's move right along, counselor, please.

Mr. Kirkland: Yes, your Honor. I'd like to call Mr. Forbes Baker.

FORBES D. BAKER

called as a witness on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir.

A. Forbes D. Baker.

Q. State your occupation.

A. Station Manager, Alaska Airlines, Fairbanks.

Q. Fairbanks, Alaska? A. That is correct.

Q. Sir, do you have with you records pertaining to the manifest for Flight No. 4 on April 14, 1954? A. I do. [221]

Q. And you have those with you?

A. They are before me.

Q. And are those your official airlines records?

(Testimony of Forbes D. Baker.)

A. These are the station copies of passenger manifest on our flights; in this case Flight 4.

Q. And are they made in your usual and ordinary course of business? A. They are.

Q. And they have been in possession of the airlines? A. At all times, yes.

Q. Is the name, Wilkins, reflected on that manifest?

Mr. Dunn: Object to that, your Honor, prior to establishing what happened to the original of these things. I understood the witness to say these are copies.

The Court: That is right.

A. These are carbon copies.

The Court: But counsel is correct if he wants to be technically correct. You may ascertain what happened to the original.

Q. (By Mr. Kirkland): Where is the original?

A. The originals have gone forward to our general offices in Seattle, Washington.

Q. In Seattle? A. Yes. [222]

Mr. Dunn: Your Honor, I object to any further questioning concerning this copy here, basing my objection to the best evidence rule.

The Court: Objection is overruled.

Mr. Buckalew: Your Honor, I'd like to make one more objection. I think that the laws of Alaska require corporations to keep their original records in Alaska.

The Court: In that respect we are not ruling

(Testimony of Forbes D. Baker.)

upon that point at the present time. Objection is overruled. You may proceed.

Q. (By Mr. Kirkland): Is the name, Wilkins, reflected on those records, sir? A. Yes, it is.

Q. What does it reflect as to the name, Wilkins?

A. We have a passenger reflected as Wilkins, Mickey.

Q. Mickey's the first name given?

A. Yes, sir. It reflects she was traveling on our ticket, Form 272, No. 32269S. It also reflects that she was boarded on Flight 4 of the 14th of April, 1954.

Q. Now, where does that flight go to?

A. It originates in Fairbanks and goes to Anchorage.

Q. And that was for the 14th of April. Is that correct, sir? A. That is correct.

Q. Before I offer this into evidence, would you have any objections if I were to introduce your records? [223] A. No, sir.

Q. You would have none? A. No, sir.

Q. Thank you sir. (Papers were handed to Mr. Kirkland.)

The Court: Do you have any further objection, counsel?

Mr. Dunn: Is the offer made, your Honor?

The Court: Do you offer it in evidence, counselor?

Mr. Kirkland: Yes, your Honor.

Mr. Buckalew: Your Honor, from the first inspection of it, I am going to object on the ground

(Testimony of Forbes D. Baker.)

that I can't tell whether it is a carbon. Part of it is a carbon copy. When they get down to "Mickey Wilkins," it is pencilled in.

The Court: May I see it, please. (Papers handed to the court.)

Mr. Dunn: I want the record to show my best evidence objection.

The Court: It already does that, counselor. Mr. Baker, can you explain why all the names preceding Nelson were made by the typewriter and the last two are made in pencil or pen as it appears.

A. That indicates that the passengers—these last two passengers who are pencilled in, arrived at the field after the city ticket office had given the field ticket office the passenger count for that flight.

The Court: Is that done in the regular course of business?

A. Yes, sir. [224]

The Court: I call to counsel's attention that is indicative of practically every other entry in this entire book. The last one or two, or maybe three and a half dozen names, have been put in by pencil, but that was done by pencil in the regular course of business and not prefabricated by you for this trial.

A. That is correct.

The Court: Do you have any other objection?

Mr. Buckalew: No, your Honor.

Mr. Dunn: No, your Honor.

The Court: Objection overruled. It may be ad-

(Testimony of Forbes D. Baker.)

mitted and marked Plaintiff's Exhibit Number 3. The second exhibit for the——

The Clerk: Is this page to be removed from the file?

The Court: What is your position?

Q. (By Mr. Kirkland): What is the position?

A. I would like to have a record for my file, whether it is a carbon copy of that or that one.

Q. This will be returned to you as soon as this trial is over. A. I understand.

The Court: But, you would like to have it in the meantime?

A. I would like to have it in order that my files be complete in Fairbanks.

The Court: That being the case, then, I think, under [225] the facts of this case, it would be better for the jurors to have this copy and counsel for the Government make a copy and then you will ultimately get this back.

A. Fine.

The Court: Very well. Will you do that, then, Mr. Kirkland?

Mr. Kirkland: Make a copy of that, your Honor?

The Court: Yes, that is correct.

Mr. Kirkland: Yes, sir.

The Court: What do you call that, Mr. Baker?

A. That is the passenger manifest for Flight 4 of April 14, 1954.

Mr. Kirkland: Your Honor, may the bailiff take

(Testimony of Forbes D. Baker.)

that down to the office and request one of our secretaries to so do.

The Court: Yes.

Mr. Buckalew: Your Honor, I am afraid we are going to need that form to cross-examine the witness.

The Court: Well, what time does your flight leave today, Mr. Baker?

A. I can get out at 5:30 or 6:00 o'clock.

The Court: That being the case, then——

Mr. Kirkland: If the court please, if counsel will stipulate, I can at least argue as to the contents without introducing them in evidence. I'm sure the jurors won't forget.

Mr. Buckalew: Counsel can't stipulate.

The Court: That being the case, you can take it down [226] after the conclusion of trial; make the form——

The Clerk: You want that copy marked?

The Court: Yes, ma'am, if you will please. You may proceed then, Mr. Kirkland.

Q. (By Mr. Kirkland): Mr. Baker, you reside at Fairbanks. Is that not correct?

A. That is correct.

Q. Have you ever seen either or both of these defendants in Fairbanks? A. Yes, I have.

Q. Do you remember when, sir?

A. Not exactly. I know I see quite a few faces in Fairbanks. I've traveled. There's people traveling through.

Q. But those faces are familiar to you in Fair-

(Testimony of Forbes D. Baker.)

banks? A. They are.

Mr. Kirkland: No further questions.

The Court: You may cross-examine.

Mr. Buckalew: Could we have just a second, your Honor? Could I have a copy of that manifest?

The Court: Will you please hand him Exhibit No. 3?

(Exhibit No. 3 handed to counsel for the defendant.) [227]

Cross-Examination

By Mr. Buckalew:

Q. Mr. Baker, when did you see either one of these people in Fairbanks?

A. Well, I recognize them. As I told you before, I see a lot of people and I do recognize them as having passed through our offices out at the terminal.

Q. You know what date it was?

A. No, I don't. I couldn't swear to that.

Q. Could it have been last year?

A. No, I don't think so. It's fairly fresh in my memory.

Q. Could you give us some idea what month it was?

A. As I recall, it was during last summer.

Q. See them together? A. Sir?

Q. Did you see them together?

A. Did I see them together?

Q. Yes.

A. As I recall, I did. I wouldn't swear to it.

(Testimony of Forbes D. Baker.)

Q. How about—What does Lt. Col. Burkley look like. Do you know?

A. No. Probably if I saw him I would recognize him. As far as connecting these peoples' names to their faces, I wouldn't have been able to do that unless—In other words, I didn't know their names, but I did recognize their faces.

Q. When did you first establish this? [228]

A. When? Establish what?

Q. The recognition. Just from the witness stand? Did Mr. Sachen point them out to you in the hall or just how did it happen?

A. No. I recognized them when I first saw them and I was also shown some pictures of them in Fairbanks.

Q. Now, Mr. Baker, when were you shown these pictures in Fairbanks? Also, how many pictures were you shown? A. As I recall, one of each.

Q. Did they show you any other pictures? Any other colored, or just a picture of this woman?

A. As I recall, it was just the picture of the one woman.

Q. Just the one picture?

A. The one picture.

Q. They asked you if you had ever seen her?

A. That is right.

Q. Ask you when you had seen her?

A. Yes, as I recall.

Q. And you couldn't tell them when you had seen them?

A. Not exactly. I told them I had seen them during the previous summer.

(Testimony of Forbes D. Baker.)

Q. During the previous summer? What year was that?

A. Well, this question was put to me a short while back—within the last couple of months and the previous summer would be the summer of 1954. [229]

Q. Did they ask you if you had seen this woman in Fairbanks in April?

A. I don't recall. It came up during the course of the questioning that they had traveled in April.

Q. Now does your memory—is your identification of this woman based on the picture that was shown to you in Fairbanks?

A. As I recall, I told the person who questioned me, that when I did see the picture, that I have seen the woman before, and I was quite sure she had traveled on our airline.

Q. But she could have traveled on your airline anytime? A. That is probable.

Q. Is it your testimony now that you only seen this woman once in Fairbanks and today in the court room?

A. No, I've seen her yesterday and——

Q. Outside of the time you've been here for this trial.

A. I could have seen her several times in Fairbanks. The face was familiar to me.

Q. How about the body? Is that familiar to you?

A. No, I don't see the body of the passengers. They stand behind a counter.

(Testimony of Forbes D. Baker.)

Mr. Buckalew: Your Honor, I am sorry about that. I meant by body, the height.

Q. Now, what was it about this woman that was so fixed in your mind? [230]

A. Her facial appearance.

Q. You saw this woman one time and you are positive you can identify her now in court?

The Court: That is not his testimony. You are misstating his testimony.

Q. Who brought the picture to you in Fairbanks, Mr. Baker? A. An F.B.I. agent.

Q. Remember what his name was?

A. John Woresham.

Q. You did see this woman in the ticket office?

A. No, I saw her out at the field.

Q. What was she doing?

A. As I recall, she was being checked in as a passenger on our flight.

Q. How many passengers do you see in one month?

A. I'd hesitate to guess even. We haul quite a few passengers. A great deal of them I do not see.

Q. How many passengers have you observed passing through there since the time you saw this woman?

Mr. Kirkland: Your Honor, I object. It's immaterial.

The Court: Objection sustained. You have a right, Mr. Buckalew to go into and ascertain the recognition of this witness, by facts that may have existed prior or subsequent to, but I think you have

(Testimony of Forbes D. Baker.)

gone beyond the normal limit in that respect. [231]

Q. (By Mr. Buckalew): Do the features of a Negro woman—are they fixed on your mind more than they are fixed on a white woman?

A. No, I think the opposite is true, but not in all cases.

Q. I see. But the features of a white woman would stay fixed in your mind longer than those in a colored woman?

The Court: He's answered the question.

A. Not in all cases.

Q. Now, can you explain to me why, in this particular case, you have an exception?

Mr. Kirkland: Your Honor, I object to any further questioning along that line. The witness has testified to all he knows in the matter.

The Court: Objection sustained.

Mr. Buckalew: This sort of amuses me. I'm just trying to——

Mr. Kirkland: If the court please, we are not here to be amused. We are here to conduct a trial.

The Court: That is correct. Objection sustained.

Q. (By Mr. Buckalew): How many times have you seen the gentleman over there with the brown suit?

A. I've seen him several times in Fairbanks International Airport.

Q. What did the F.B.I. agent tell you when you identified the pictures? [232]

Mr. Kirkland: Object to that as immaterial.

(Testimony of Forbes D. Baker.)

The Court: Objection sustained. It can't have any relevancy whatsoever, counsel.

Mr. Buckalew: Well, I think it might, your Honor.

The Court: Objection sustained.

Q. The F.B.I. agent had one picture of this man?

A. As I recall, I think there was one picture.

Q. What kind of picture was it?

A. Explain your question.

Q. Well, I mean was it a portrait from the waist up or was it a picture of the man standing in back of a blackboard—his whole body.

A. I think it was a picture from about here on up with some numbers in front of him.

Mr. Buckalew: Your Honor, I can't see anything that funny.

Mr. Kirkland: I can.

The Court: Apparently, counsel, it's a matter of opinion.

Q. And they just showed you the two pictures?

A. One picture of the gentleman and one picture of the lady, yes.

Q. Is the picture that was shown to you indicate that this man had a mustache?

Mr. Kirkland: Your Honor, I object to any further questions along this line because the witness testified [233] the identity of this person as independent of the photograph that was shown to him.

The Court: I point out to you, Mr. Buckalew, in that respect he has indicated he has seen this de-

(Testimony of Forbes D. Baker.)

fendant several times in Fairbanks. He doesn't rely upon the picture by itself; therefore, the objection will be sustained. If by chance you only identified it from the picture, then your question would have been proper.

Mr. Buckalew: The only thing I was trying to ascertain, your Honor, was whether or not this identity—I don't care what the witness says—I want to ascertain what importance, and the fact you can show the two pictures of these two people.

The Court: Of course, I think that is understood by the record of your questions, but I feel that the objection was properly sustained.

Q. (By Mr. Buckalew): What outstanding feature of the man in the brown suit is fixed in your mind?

A. No outstanding feature. In other words, I remember the whole face. I didn't remember just his nose or his eyes, or anything like that.

Q. You remember how he was dressed the last time you saw him?

A. As a matter of fact, I don't.

Q. You don't know whether he was dressed in fatigues or had a suit on? [234]

Mr. Plummer: I object to that on the grounds of its being immaterial. The date he last saw him wasn't given or anything else.

Mr. Buckalew: I know he doesn't know when he last saw him.

The Court: Objection sustained. Mr. Buckalew, the court feels you have gone quite far afield in try-

(Testimony of Forbes D. Baker.)

ing to test the veracity of this witness and his identity of recognition of these two defendants.

Q. (By Mr. Buckalew): Mr. Baker, do you recognize that man? (Pointing to man standing in the audience.)

A. No, I can't say that I do.

Q. That man wasn't with this man in a brown suit in Fairbanks?

A. Can't say that he was or that he was not.

Q. You don't recognize this fellow at all?

A. No, I don't.

Q. Now, I want to ask this question, your Honor, and I want to assure the court I have a good reason for asking it. Now I don't think he answered the question. At the time the F.B.I. showed you the picture, did they tell you the purpose for the investigation? Did they tell you the reason they wanted to identify these particular people?

Mr. Kirkland: Object to it's being immaterial and irrelevant. [235]

The Court: Objection overruled. He may answer.

A. As I recall, when Mr. Woresham showed me the picture, he asked me if I recognized these faces and I told him that I did recognize the faces; that I had seen them before; that I had seen them in connection with our flights at the field.

Q. Did you identify the people immediately?

A. As soon as I saw the pictures, yes.

Q. But you don't recall whether or not the F.B.I. told you that they were building a White Slave case?

(Testimony of Forbes D. Baker.)

Mr. Kirkland: Object to that because it's showing bias, your Honor.

The Court: Objection overruled. He may answer if he recalls.

A. As I recall, he—Mr. Woresham—did state something about that. I think what he said was they were trying to establish whether or not a certain person, and I assumed that these were the people, were in one place or another at a certain time.

Mr. Buckalew: Just one more question, your Honor. Then, I will be through.

Q. Now, it is your testimony that your best recollection is that you seen them in Fairbanks in the summer time? A. That is right.

Q. And that you have never seen them together?

A. I could possibly have seen them together. I don't recall it. [236] It isn't outstanding in my mind that I did see them together.

The Court: Any cross, Mr. Dunn?

Mr. Dunn: Very little, your Honor.

Q. (By Mr. Dunn): Now, do you usually call this F.B.I. agent, Mr. Woresham?

Mr. Kirkland: Object to that as being completely irrelevant.

The Court: Objection sustained.

Mr. Dunn: What do you usually call the F.B.I. agent?

Mr. Kirkland: Excuse me. I believe the objection was sustained.

The Court: That is right, counselor.

Q. Is Mr. Woresham a friend of yours?

(Testimony of Forbes D. Baker.)

Mr. Kirkland: Object to that, your Honor.

The Court: Objection overruled.

A. I speak to him every time that I see him. He speaks to me when he sees me. We have nothing social.

Mr. Dunn: Thank you.

The Court: That is all. You may step down.

(Thereupon the witness was excused and left the witness stand.)

The Court: May this witness be excused to return to Fairbanks?

Mr. Kirkland: As far as the Government is concerned, he may be excused.

Mr. Buckalew: As far as the defendants. [237]

The Court: Very well. Thanks for coming, then, Mr. Baker. You may call your next witness.

Mr. Kirkland: May we approach the bench in regard to a copy of this.

The Court: You may. The court would like very much, if possible to have another witness tonight.

Mr. Plummer: This will just take a minute, your Honor.

The Court: Well—very well. Mr. Kirkland, I'd like to give this to you so you may give it to Mr. Baker (referring to manifest). Very well. Can we move along, please.

Mr. Plummer: Yes, your Honor. On this receipt No. 1813 which has previously been identified, we do have a copy prepared at this time, and I, at this time, offer it in evidence.

The Court: Very well. You may show it to counsel. Is there any objection?

Mr. Dunn: We repeat our objection, your Honor, we made to the original.

The Court: But not to—as to the copy itself?

Mr. Dunn: No. We stipulate copy may be substituted.

The Court: Very well. It may be admitted and marked Plaintiff's Exhibit No. 2.

Mr. Kirkland: If it please the court, I'd like to call Mr.—if he will—or may we be excused.

The Court: Off the record please.

(Thereupon an off-the-record discussion was had out of the [238] hearing of the reporter.)

Mr. Plummer: Your Honor, do I have leave of the court to return this receipt to the official records?

The Court: Mr. Buckalew—Mr. Dunn, any objection to him returning that to Mr. Briggs?

Mr. Buckalew: No, your Honor, no objection.

Mr. Dunn: No, your Honor.

The Court: Thanks for coming, Mr. Briggs and Mr. Baker. You may call your next witness.

Mr. Kirkland: If the court please, could I be allowed to put on two more witnesses this afternoon?

The Court: The court will see what we can do.

Mr. Kirkland: He is a local witness, but I want him first.

The Court: I think you better call your outside witness first.

Mr. Kirkland: Very well. Mr. Disney.

CLARENCE DISNEY

called as a witness on behalf of the Government, and being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Kirkland:

Q. State your name, please?

A. Clarence Disney. [239]

Q. And your occupation?

A. Deputy U. S. Marshal, Kodiak.

Q. Mr. Disney, have you ever seen the defendant, Lena Mae Wilkins, before? A. Yes, I have.

Q. And where did you see her, sir?

A. In Kodiak.

Q. Can you remember the month?

A. It was in the spring—in April I believe—I believe, April 28, on or about April 28, and on one other occasion I had occasion to see her.

Q. Did you call upon her in the early spring in April?

A. In April? In April, yes, I did interrogate Lena Mae Wilkins. I also know her as Mickey Wilkins.

Q. Yes. Now, what was the source or reason for your calling upon her?

A. Common knowledge in Kodiak she was——

Mr. Dunn: I object to that, your Honor. He can testify what he knows, but I don't think he can testify what was rumored about the town.

The Court: Unless the proper foundation is laid that is true.

Mr. Kirkland: If the court please, I believe we

(Testimony of Clarence Disney.)

have a special Territorial statute with regard it as evidence for maintaining a bawdy house. It's Section 65. [240]

Mr. Dunn: Your Honor, there's no such charge here.

The Court: What citation, please?

Mr. Kirkland: Just a moment, your Honor.

* * * Section 65—9—14, your Honor.

The Court: Very well.

Mr. Dunn: Loan me your copy, please.

The Court: Of course, that is standard law on reputation. You haven't laid the proper foundation in respect thereto. If you lay the proper foundation, I think it is admissible.

Mr. Kirkland: Very well.

Q. (By Mr. Kirkland: As Deputy Marshal in Kodiak, were you acquainted with the general reputation of the defendant, Lena Mae Wilkins, in Kodiak, Alaska?

Mr. Dunn: Objection, your Honor. Her general reputation—her character is not a matter of issue in this trial at all.

The Court: Reputation is limited to reputation; however, it is a case of prostitution. I do think that the question of character does come into consideration other than normally admitted. Ordinarily it's a question of reputation. Very well, you—objection is overruled. You may inquire.

Q. You are acquainted with the defendant's general reputation in Kodiak?

(Testimony of Clarence Disney.)

A. Yes, from complaints received from an official capacity in [241]—as Deputy Marshal. I received complaints from City police, neighbors and others. Apparently there was something going on.

Mr. Buckalew: I'd like to object. He is not a qualified witness to testify as to general reputation in Kodiak. He is basing it on specific acts and he hasn't said anything about her general reputation in the town of Kodiak.

The Court: What you should do, Mr. Disney, is this——

Mr. Buckalew: Strictly hearsay, your Honor.

The Court: Reputation is nothing but hearsay, counselor.

Mr. Buckalew: I understand. General reputation is general hearsay, but he is basing it on specific acts; that he knows every police officer; if he knows what her general reputation is, if he talked to people and knows from his conversation with these people that she has the reputation of a prostitute. She is qualified to testify, but he's already stated from the stand. He's basing his testimony on specific complaints, not on any evidence brought to him as to her general reputation.

The Court: Are you through?

Mr. Buckalew: That is what takes it out of the hearsay—I guess I am through, your Honor.

Mr. Kirkland: I submit that what makes it hearsay——

The Court: Just a minute, counsel, just give the court a chance. Maybe I would be able to rule; to

(Testimony of Clarence Disney.)

say both counsel—but if you are going to talk continuously, which—the court is [242] endeavoring to break in, which is the right of court, then the court will have to abide by the assumed right of counsel to argue *ad infinitum*, if you—I caution both counsel, Mr. Buckalew particularly, that the court is endeavoring to rule in your favor, but you continue to talk and don't give the court a chance or opportunity to even rule in your favor, so I would caution you on that point, not to do that. Mr. Disney, the court would instruct you at this time on this particular subject, you should answer the questions only as are asked to you in yes or no fashion, not go on a story type of answer.

A. Yes, sir.

The Court: You may proceed.

Q. (By Mr. Kirkland): Are you acquainted with the defendant, Lena Mae Wilkins' general reputation in Kodiak, sir?

A. Yes, sir.

Q. And what is that reputation?

Mr. Buckalew: Objection.

The Court: Objection sustained.

Mr. Buckalew: He hasn't laid the proper foundation.

The Court: Objection sustained. It isn't proper. The court's sustained it. Counsel should get together. It's in your favor.

Mr. Kirkland: Very well.

Q. Mr. Disney, have you discussed the witness' general [243] reputation in Kodiak with other persons?

A. I have.

(Testimony of Clarence Disney.)

Q. And you are familiar with her general reputation in Kodiak? A. Yes, sir.

Q. Now, sir, what is the defendant's general reputation in Kodiak—the defendant, Lena Mae Wilkins?

Mr. Buckalew: Now, your Honor, before he answers, I don't think the proper foundation has been laid.

The Court: Objection sustained. Proper foundation has not been laid.

Mr. Kirkland: Your Honor, could I at least argue this reply before the court rules?

The Court: No, because it is obvious you are in error, counselor, not laying the proper foundation.

Mr. Kirkland: I take exception to his Honor's ruling in this type of case.

The Court: Listen, counsel, you haven't stated what his reputation for this, and another, you just ask what reputation is for what. It must be specific.

Mr. Kirkland: Your Honor, I am proceeding under the statutes which I cited to the court.

The Court: Court has ruled, counsel; I don't wish to argue with you.

Q. (By Mr. Kirkland): What was her—are you acquainted with the defendant's [244] reputation for morality and decency?

A. Yes.

Mr. Buckalew: Now, your Honor, I've got—I want to point out to counsel where I think principal objection lies. He hasn't elicited from this witness how long this particular woman was in Kodiak; how

(Testimony of Clarence Disney.)

many people he talked to; we've got to know how much observation and how long she lived there, or what length of time it took to build up this so-called reputation. I don't know; she might not have been there long enough to have any reputation in the town of Kodiak.

The Court: The court will sustain the one point only; that is, it has not been put down to a time certainty. Therefore, may the court advise you that you should ask this witness whether or not that he knew the defendant, Lena Mae Wilkins, on or about the 28th day of April, 1954.

Q. Did you know the defendant, Lena Mae Wilkins, during April of 1954, or May, or in the spring?

A. I stated before that I only met her twice—April 28 was one of those times, that I interrogated her.

Q. And then you did know her in April 28? Is that correct? A. Yes.

Mr. Kirkland: Your Honor, may he answer the question now that I asked previously?

The Court: You may now ask the question.

Q. What was the defendant's general reputation for morality [245] and decency, sir?

Mr. Dunn: Objection, your Honor.

The Court: What is your objection?

Mr. Dunn: My objection is different than Mr. Buckalew's. Unless I am mistaken, the law on this matter—her reputation—evidence concerning reputation is admissible in order to attack the veracity

(Testimony of Clarence Disney.)

of a witness, and it is admissible only for that purpose, and even for that purpose, general reputation with respect to any specific trade cannot be shown by specific instances of misconduct. I think that is the law. Now, the defendants, neither of them, have been witnesses to date in this trial, and until such time as they have become witnesses, and hence their veracity is a matter for consideration of this court and this jury. I think every question concerning the reputation of both of these defendants is improper.

The Court: Objection sustained.

Mr. Kirkland: If the court please, could I be heard on the subject?

The Court: Yes, you may.

Mr. Kirkland: I am not proceeding under the theory of general reputation at all. I am proceeding under a Territorial statute which states as to evidence and the submission of the evidence and that type. That is the reason I am not laying the foundation.

The Court: I see. [246]

Mr. Kirkland: I am not going into the general character and reputation of the witness. I haven't been under that theory to begin with.

Mr. Dunn: Well, your Honor, I'd like to be heard when the court is ready.

The Court: Now, you are relying, counselor, upon 65—9—14?

Mr. Kirkland: That is right, your Honor. I con-

(Testimony of Clarence Disney.)

tend if you can prosecute them for the crime—if a person can be convicted for the crime on that type of evidence, certainly that type of evidence would be admissible to establish—I am going to establish the intent for a person being in that area.

The Court: That is true, counselor, but on the other hand, Mr. Dunn points out a very cogent point, that while a defendant's reputation is always at issue in the trial of a case, I do not think that that can be a fact until such time as it has become an issue.

Mr. Kirkland: I agree with his Honor. However, this is a statutory exception.

The Court: I'd like to hear you on that point, Mr. Dunn. I point out to you the section states, "That in all prosecutions for the crime defined in the section last preceding, common fame shall be competent evidence in support of the indictment." That being the case, then, that would mean the Government would have to bear the burden of [247] proof.

Mr. Dunn: Your Honor, it seems to me that Section 65—9—14 speaks for itself; in the first words of that section where it says, "That in all prosecution for crimes defined in the section last preceding," and the crimes defined in the sections last preceding are no parts of the indictment here. And hence, this particular statutory exception of which counsel seeks now to avail himself, cannot aid him. The crimes in the section last preceding are no part

(Testimony of Clarence Disney.)

of these proceedings, and hence they are immaterial in the proceedings.

The Court: Now, aren't you overlooking this fact——

Mr. Dunn: I hope not.

The Court: It is a crime of conspiracy for that purpose set forth in the section before. Therefore, it behooves the Government to prove that a house was kept for that purpose.

Mr. Dunn: Do I understand your Honor to say that the charge here is conspiracy to set up a house of ill-fame?

The Court: No, that isn't it. The court stated——

Mr. Dunn: That is, the only charge up here is to keeping or setting up a house of ill-fame. There is no conspiracy to either keep or set one up as charged.

The Court: What is your position in that respect, Mr. Kirkland?

Mr. Kirkland: Your Honor, my position in that respect is as follows: If that is competent evidence and a charge of that nature to send a person to the penitentiary, it should [248] logically follow that it should be competent evidence under our statutes as to the person's occupation in the village of Kodiak, wherein it is going to the proof of the indictment that they conspired that she would be transported with the intent to engage in prostitution and debauchery.

Mr. Dunn: Counselor can avail himself only of

(Testimony of Clarence Disney.)

what the legislature did do, not what he thinks the legislature should have done. If the legislature set up one exception, that only one counsel can use. He can't use one that he thinks logically follows from one the legislature did allow.

The Court: Excepting this, aren't you overlooking the fact that this particular section is an integral part of this indictment which counsel for the Government must prove?

Mr. Dunn: I am lost, your Honor. I don't see it's any part of the indictment.

The Court: Well, the court does; therefore, the objection will be overruled. You may answer.

Mr. Buckalew: Your Honor, I'd like to renew my objection.

The Court: You may renew the objection and likewise the same ruling. Overruled.

Mr. Buckalew: I haven't stated it.

The Court: Excepting, you renew it—what you have already stated.

Mr. Buckalew: I was going to enlarge it. [249]

The Court: Objection overruled. You have been heard once on it.

Q. (By Mr. Kirkland): Will you answer the question now, please, sir?

A. What was the exact question again?

Q. Well, sir, what was the defendant, Lena Mae Wilkins, reputation in Kodiak as to what type house she maintained?

Mr. Buckalew: I didn't get the question?

(Testimony of Clarence Disney.)

The Court: As to what type of house she maintained.

Mr. Dunn: I object to that, your Honor, because that is not a part of a person's character. If you rule that this statute is applicable at all, it is applicable for showing the common fame of the individual. I take it that is their over-all characteristics, not what kind of house she kept.

The Court: The court feels that you should rephrase your question, and as to the reputation of the defendant as to morality and decency.

Mr. Kirkland: Then, your Honor, the next question you will say—have to answer good or bad; that is not the answer I want.

The Court: Well—but then, we must abide by the rules. Now, the court instructed you to ask that question, Mr. Kirkland, as outlined by the court.

Q. What was the defendant, Lena Mae Wilkins, general reputation for morality and decency in Kodiak, Alaska, at that time? [250]

A. It did not comply with Territorial laws at that time.

Q. Thank you, sir. Did you go out to have a discussion with her?

A. Yes. From the information I did interrogate her about her work.

Q. Now, will you tell the court what took place at that discussion.

Mr. Buckalew: Your Honor, I am going to object to it on behalf of the defendant, Yokely, on the ground it's hearsay.

(Testimony of Clarence Disney.)

The Court: Objection overruled. You may answer. It's a question of conspiracy, Mr. Buckalew.

Mr. Buckalew: Sir?

The Court: It's a question of conspiracy; that is, the indictment. Therefore, as I pointed out this morning, in ruling of admissibility of that evidence, that that statement of one could conspire, or can bind the acts of another.

A. I did discuss with her the problem of her getting employment in Kodiak. At that time she stated she did not have any regular means of livelihood. I asked her if she intended to do so. She said, yes. And that in general was our conversation and my interrogation of her to find out where she was from, she said to me she was from Fairbanks. She had been in town a short time and a short time later, she left town.

Q. Did you go to see her again before she [251] left?

A. I think it was a week or ten days later, I went back to find out what work she did get in town, in the way of waitress work or housekeeping, and she stated that she hadn't found work yet and at that time my interrogation was ended and I left and two days later she left town.

Mr. Kirkland: Thank you, sir. No further questions.

The Court: You may cross-examine.

(Testimony of Clarence Disney.)

Cross-Examination

By Mr. Buckalew:

Q. Mr. Disney, is this a social call?

A. It was in response to these complaints—numerous complaints I had received about a certain area that was occupied by a Negro girl. I didn't know her name at the time.

Q. How long had she been in town?

A. I don't know that. I only got those complaints that day. I went out that evening to find out what it was all about; where this house was; who the person was; and all.

Q. Now, these complaints, how long a period of time elapsed from the time you got there?

A. I don't know. I don't know when they got to Kodiak.

Q. Was it a week? A. I don't know. [252]

Q. You don't know how long she was in Kodiak?

A. No, except I do know April 28 I did interrogate and a week later I interrogated her again, and she left town after that.

Mr. Buckalew: Your Honor, I'm going to ask the court to strike all of this witness' testimony. He doesn't even know how long she was in Kodiak.

The Court: That certainly isn't grounds for objection.

Mr. Buckalew: As to his testimony as to her general reputation, it is one of the necessary elements.

(Testimony of Clarence Disney.)

The Court: That is right. What you may do, then, counsel, you may ask him whom he discussed it with and the dates and times that he did discuss it.

Q. When you interrogated——

Mr. Kirkland: If the court please, in order to save time with counsel, I will stipulate then that this portion—her reputation will be stricken, but as to her reputation only.

Mr. Dunn: Now, your Honor, I think that is just a magnanimous gesture, after he has drawn it out of the witness before the jury.

The Court: Objection overruled. You may inquire, Mr. Buckalew.

Q. Did this defendant ever mention Mr. Yokely to you? A. No.

Q. Never heard the name, Yokely?

A. No, I never heard the name before. [253]

Q. How many complaints did you get on it?

A. The City patrolman on duty mentioned it to me and the one that works nights mentioned it to me. Apparently he had gathered this information the day before—a couple of days before and he presented it to me because it apparently was out of his jurisdiction, outside the City limits in the area of this place where she was living, which was not her home, she wasn't paying rent on it was where I got the other complaints, and apparently——

Q. How do you know she wasn't paying rent then?

A. I asked her. I asked her who was paying that

(Testimony of Clarence Disney.)

rent for the house in my first interrogation on April 28.

Q. Was she down there to see a boy friend of hers?

A. She didn't tell me that. She told me she was there to go to work.

Q. Whose house was she in?

A. I don't know. The Bank of Kodiak was renting the house.

Q. Were they renting the house to Lena Mae Wilkins? A. No.

Q. Who were they renting it to?

A. I don't know.

Q. Who else was in the house?

A. Some other Negroes. I didn't know their names.

Q. Some other Negroes?

A. On two different occasions there were Negroes in the house, yes. [254]

Q. How long was Lena Mae in Kodiak, do you know?

A. No. I had no knowledge of how long she was in town except she was there April 28 and she left sometime in May—the 10, 11 or 12.

Q. Do you know whether or not she had a job on the Naval Air Station? Do you know whether she worked as a maid at the Naval Air Base?

A. I ordinarily would have known of that, but I didn't know she was working any place.

Q. Now, didn't she tell you she was visiting a certain individual in Kodiak? A. No.

(Testimony of Clarence Disney.)

Q. She didn't tell you that? A. No.

Q. You called on her after you got the first complaints?

A. Well, not first complaints. I had received apparently about the same time several complaints.

Q. What kind of evidence did you have?

A. Excessive traffic to a house indicates that there is something wrong. This policeman talked with taxi drivers. They talked with bartenders that something is wrong and he reports that to me.

Q. Did you talk to anybody that had intercourse with this woman in Kodiak?

A. I certainly tried. I was unable to get any signed statement [255] from anybody that she collected money, so my interrogation of her.

Q. As far as you know, she might have entered into any unlawful activity?

A. Except for her common reputation.

Q. And that was passed on a couple of complaints you had?

A. More than a couple. Numerous complaints.

Q. What do you mean by numerous complaints. How many complaints?

A. At least eight to twelve.

Q. Were any of the complaints for drinking and loud noises?

A. No. At the time I talked with Lena Mae she was very sober.

Q. I am talking about the complaints. You got eight or ten complaints on it.

A. Yes. Too much traffic to the house.

(Testimony of Clarence Disney.)

Q. Is that a crime?

Mr. Kirkland: Your Honor, I object to any further questions along the line——

The Court: Objection sustained.

Mr. Buckalew: Your Honor——

The Court: Objection sustained, Mr. Buckalew. She's not being——

Q. With all of these complaints you didn't come up with any evidence you could prosecute her on?

A. Lot of verbal statements were given to me that I could not [256] use in court, that she was in Kodiak for the particular purpose of engaging in prostitution; that's the verbal complaint, but I couldn't get it in writing.

Q. Did you ask anybody in the City of Kodiak what her general reputation was?

A. No. They had come to me with that information.

Q. Now, answer the question. Did you ask anybody in the City of Kodiak what her general reputation was?

Mr. Kirkland: Objection, your Honor. The witness answered the question.

The Court: Objection sustained. The record will speak for itself, Mr. Buckalew. Are you through, Mr. Buckalew?

Mr. Buckalew: Yes, I am.

The Court: Mr. Dunn, you want to inquire? We want to finish up this witness tonight if we can, so he may go back to Kodiak.

Mr. Buckalew: Your Honor, it's 5 o'clock.

(Testimony of Clarence Disney.)

The Court: That is right. This gentleman has been over here for a long period of time. I feel we ought to exert ourselves to finish up tonight with this witness if possible.

Q. (By Mr. Dunn): Did you obtain, Marshal, as many as one formal complaint against the defendant, Wilkins?

The Court: What do you mean, counsel, by formal?

Mr. Dunn: That is, actual written [257] complaints.

A. A verbal complaint to me is as legal as anything else.

Q. Prosecute on a verbal complaint?

A. I will make a complete investigation on a verbal complaint, yes, sir.

Q. Was there ever a complaint filed in court concerning the defendant, Wilkins?

A. No. If I had the evidence, I would have signed the complaints.

Q. You didn't have any evidence?

A. No one would sign statements, no.

Q. If you had the evidence, you would have filed a complaint?

A. It would have been filed.

Q. And you didn't file a complaint?

A. No.

Q. You said an oral complaint would start you off on investigation just the same as any complaint, did you not? A. That is right.

(Testimony of Clarence Disney.)

Q. And you investigated these oral complaints thoroughly?

A. To the best of my ability, yes.

Q. And you had eight to twelve complaints?

A. Yes.

Q. And to your knowledge—your own personal knowledge, the defendant, Wilkins, was only in Kodiak a week to ten days?

The Court: No, that is not the testimony, counselor.

Mr. Dunn: What is your testimony? [258]

The Court: Well, the record speaks for itself, Mr. Dunn. He stated that he interrogated the witness on or about the 28th day of April. He doesn't know when she arrived and that she left on or about the 10th or 12th of May.

Q. (By Mr. Dunn): Is that correct?

A. That is right.

Q. Left about the 10th or 12th of May?

A. That is right.

Q. The first time you knew she was there was April 28? A. That is right.

Q. You have very many Negroes in Kodiak?

A. Yes. I suppose we have the same percentage as other communities.

Q. Well, now, when you said that you knew the general reputation of Lena Mae Wilkins, did you mean that you knew that eight to twelve people had complained about her. Is that what you meant?

A. To my knowledge, yes.

Mr. Dunn: I have no further questions, your

(Testimony of Clarence Disney.)

Honor, but I move to strike the witness' testimony concerning the reputation of the defendant, Lena Mae Wilkins, in cross-examination as elicited, that not only does the witness not know her general reputation, but could not have known the general reputation during the time that he knew she was in Kodiak and due to the fact that, [259] of the complaints from a very few people that he received, he wasn't able to get any evidence against her.

The Court: Motion denied. Any redirect?

Mr. Kirkland: No redirect, your Honor.

The Court: May this witness be excused?

Mr. Kirkland: As far as the Government is concerned, he may.

Q. (By Mr. Buckalew): Mr. Disney, the first time you interviewed——

The Court: Just a moment, please. I point out to you that Mr. Kirkland sponsored this witness. Didn't you cross-examine him?

Mr. Buckalew: Sort of, yes, sir.

The Court: And Mr. Dunn just got through cross-examining. There has been no redirect; therefore, you haven't any right to recross without leave of the court.

Mr. Buckalew: I ask his Honor, then, to give me permission to ask one more question and call it further cross-examination. I just have one more question I want to ask the witness.

The Court: Very well. You may do so.

Q. (By Mr. Buckalew): Now, the first time you

(Testimony of Clarence Disney.)

interviewed her, Mr. Disney, didn't you ask her how long she had been in Kodiak ?

A. I believe she told me she had been in Kodiak a couple of [260] weeks, but I didn't know that. She told me that—two or three weeks.

Mr. Buckalew: That is all.

The Court: Very well. You may be excused, then. Thanks for coming, Mr. Disney.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Kirkland: Might I call one more witness ?

The Court: No. I think this is ample. There is a limit to what the court personnel can take, and they are not paid for overtime. I'd like to get this through just as much as you would, counsel, but there is a limit to what the court can do. The court will—this trial will be continued until tomorrow at the hour of 10:00 a.m., and again I must instruct you Ladies and Gentlemen of the Jury not to discuss this case among yourselves or permit others to discuss it with you. The court will remain in recess for five minutes. Recessed at 5:06 o'clock p.m.

(Whereupon, at 5:11 o'clock p.m., court reconvenes, following a 5-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Did you have anything to bring to the court, Mr. Buckalew?

Mr. Buckalew: No, sir.

The Court: The court will stand adjourned until [261] tommorrow morning at 10:00 o'clock a.m.

(Whereupon, at 5:12 o'clock p.m., the court continues the cause to 10:00 o'clock a.m., December 23, 1954.) [262]

December 23, 1954

The Court: You may call the roll of the jury.

The Clerk: Trial jury is all present, your Honor.

The Court: Ladies and gentlemen of the jury, the court was phoned this morning by Mr. Buckalew who advised the court that he is physically incapacitated to proceed with the trial today. I have a statement from his doctor to that effect, therefore, out of fairness to the defendant the court will have to continue this trial and it will be continued until next Monday morning at the hour of 11:00 a.m., as the court has another matter set down at 10:00 o'clock. May I at this time wish you a Merry Christmas and the court will remain in session for other business. You may now be excused.

(Thereupon, at 10:05 o'clock a.m., this case was continued to Monday, December 27, 1954, at 11:00 o'clock a.m.) [264]

December 27, 1954

The Court: You may call the roll of the jury.

The Clerk: Trial jury is all present, your Honor.

Mr. Dunn: Well, the doctor's statement, your Honor, speaks of another day's rest, I think, and that day would be today, so unless his diagnosis is incorrect she should be ready in the morning.

The Court: Mr. Kirkland, could you advise the court as to how long this Bop hearing will consume tomorrow?

Mr. Kirkland: It is my understanding Mr. Cooper is not going to oppose it. Is that correct, sir?

Mr. Cooper: Well, yes, that is the representation I previously made to the court, but apparently they insisted on a hearing so I have no idea what they anticipate doing here, your Honor.

Mr. Buckalew: Your Honor, could we approach the bench?

The Court: You may.

(Whereupon, all counsel approached the bench and the following proceedings were out of the hearing of the jury:)

Mr. Buckalew: Your Honor, Mr. Dunn and I think Mr. Kirkland ought to send a doctor down, representing the Government, to examine Lena Mae Wilkins. This puts Mr. Dunn and I in a very embarrassing position. I suspect that perhaps our co-defendant might have gotten the idea of illness from the fact that [268] a continuance was granted by the court on the ground that I was unable to appear. I think to protect the court and to protect Mr. Dunn and myself that the Government should send a physician down to examine her.

Mr. Dunn: I would concur in that, your Honor,

because it would remove from me any possible suggestion that I am representing that this defendant is ill. I am not underwriting her illness or I am not making any representations at all concerning it.

The Court: I don't doubt your position, Mr. Dunn. What position do you take, Mr. Plummer?

Mr. Plummer: Well, we have no objection to having an examination made. We would not do it—I mean, if the court orders it and pays for the examination out of Fund “C.”

The Court: Well, the court feels since Dr. Jackson, who is a friend of Mr. Dunn and is a reputable physician, made this statement that he wouldn't have made it unless it substantially bore out the facts.

Mr. Dunn: Well, the statement strikes me, your Honor, as not being a particularly strong statement. I think everything in the statement is true because I don't think Russ Jackson would have signed his name to it if it wasn't true, but it doesn't say very much.

Mr. Kirkland: Of course, the problem is, probably, Mr. Dunn, the person could feign those symptoms and a doctor [269] couldn't actually tell.

The Court: What position do you take then?

Mr. Kirkland: I don't know whether we would accomplish anything. We couldn't go to trial any earlier anyway by the time the doctor got down to examine her.

Mr. Buckalew: It would be protection for the following day. I am afraid before the trial gets to

conclusion I think these symptoms will be more prominent. If I was in her position and I had those symptoms I think it would be more aggravated the closer we got to the conclusion of the trial.

The Court: Well, in that respect we don't want to expend any more money than we have—than is necessary—and if you don't insist on it, I will not.

Mr. Dunn: May I make this suggestion, your Honor. That it may be costing the Government more money to have these jurors tied up day after day than it would to have her examined and make sure she is in court. So far as the expense of the thing is concerned the court can deduct it from my \$150.00—if that will solve the problem.

The Court: Well, we couldn't do that.

Mr. Buckalew: I will split it with you.

The Court: What position do you take?

Mr. Kirkland: Could we at least call Dr. O'Malley and see if he could go down and find out whether a person can feign those symptoms? [270]

The Court: Well, as you pointed out, it is obvious they could. I think any lay mind would know that, so you accomplish nothing by that.

Mr. Kirkland: I feel as though we should have something because I don't want this matter delayed. I am sure the court doesn't either and neither does counsel.

Mr. Plummer: If one of the jurors get sick we will really be in trouble.

The Court: That is right. That what is worry-

ing me no end. I feel you ought to take a firm stand as representing the Government.

Mr. Plummer: Let's request the court to have a medical examination of the defendant.

The Court: This is what I had hoped you would do, after all, you represent the Government.

Mr. Buckalew: We won't object to it.

The Court: Well, then, do you now?

Mr. Kirkland: Yes, sir.

Mr. Plummer: We do so suggest and request.

The Court: Very well. A minute order may be entered authorizing a doctor to be employed by the District Attorney's office to have a physical examination made and under the circumstances I wonder if we shouldn't continue this until Wednesday and we will get that Bop matter over with.

Mr. Plummer: Before we do that let's have some more [271] conversation with Mr. Cooper. He doesn't object to the revocation of the license and all we objected to was their withdrawing the petition.

The Court: Let's assume this fact though, that it will take all day tomorrow. Don't you think under the circumstances we better continue this until Wednesday morning?

Mr. Plummer: I think if we talk with Mr. Cooper and if he is willing to submit to the revocation without the withdrawal we will have nothing to do on B.O.P.

The Court: But you must apprise him of the fact there is likely to be criminal action to be taken upon the application.

Mr. Plummer: We have already filed and he represents the people on the criminal action.

The Court: Let's assume it will take all day tomorrow——

Mr. Plummer: We will only have to put on a prima facie case and we would have 3 witnesses.

The Court: That being the case then we possibly should continue this until 2:00 p.m. tomorrow.

Mr. Plummer: I think that is probably true.

The Court: Very well. Thank you.

(Whereupon, counsel resumed their respective tables and the following proceedings were had in the presence of the jury.)

The Court: The record will speak for itself reference the consultation of counsel at the bench. [272]

(Whereupon, after discussion regarding the B.O.P. case the following proceedings were had.)

The Court: Upon stipulation of counsel the hearing which was set down for tomorrow at 10:00 a.m. can be very briefly taken care of, therefore, this trial will be continued to tomorrow morning at 10:00 a.m. Again I must instruct you not to discuss this case among yourselves nor permit others to discuss it with you. You may now be excused to report tomorrow morning at the hour of 10:00 a.m.

(Thereupon, at 11:40 o'clock a.m. this case was continued to Tuesday, December 28, 1954, at 10:00 o'clock a.m.) [273]

December 28, 1954.

The Court: Is counsel for the Government ready to proceed in the case of United States of America vs. Yokely and Wilkins?

Mr. Kirkland: Government is ready, Your Honor.

The Court: Is counsel for the defendants, Mr. Dunn and Mr. Buckalew, ready to proceed?

Mr. Dunn: Ready, Your Honor.

Mr. Buckalew: Ready, Your Honor.

The Court: Very well. You may call the roll of the jury.

The Clerk: Trial jury is all present, Your Honor.

The Court: Very well. The Government may call its next witness.

Mr. Kirkland: I would like to call captain Marten.

DOYNE K. MARTIN

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please?

A. Doyne K. Marten.

Q. And your occupation, sir?

A. Soldier. [275]

Q. And your present assignment?

A. I am station Commander, Alaska Communications System, here in Anchorage.

(Testimony of Doyne K. Martin.)

Q. And, Captain, you were subpoenaed to appear in court and received a subpoena duces tecum, is that correct? A. Yes, sir.

Q. Do you have a certain telegram dated June 1, 1954, to Mrs. Lena Mae Wilkins at 1806 East "I" Street, Anchorage, Alaska, from one James Yokely in Portland, Oregon?

A. I have a telegram here to a Mrs. Lena Wilkins. It is signed Yakely, Y-a-k—Possibly could have been a typographical error, I don't know.

Q. And do you have a telegram dated on or about May 13, 1954, from James Yokely to Bill Jordon at Kodiak, Alaska, or a telegraphic money order that is in the amount of \$45.00?

A. Yes, sir, I have a T.M.O. dated 11 May to be paid to William Jordon at Kodiak, Alaska, from James Yokely.

The Court: Counselor, do you offer them in evidence?

Mr. Kirkland: Yes, sir, Your Honor, I offer them in evidence.

The Court: Is there any objection, Mr. Dunn or Mr. Buckalew?

Mr. Dunn: Your Honor, I repeat an objection previously made concerning the best evidence rule. These things being copies and also the fact that the discrepancies as they appear in those [276] telegrams—or copies of telegrams are such that I seriously doubt if proper foundation has been laid to make them admissible against these 2 defendants. I think it would be the burden of the

(Testimony of Doyne K. Martin.)

prosecution to tie these telegrams to these people rather than simply show a similarity in names.

The Court: What is your position, Mr. Kirkland?

Mr. Kirkland: Your Honor, we are offering that in support of the statement of the defendant Lena Mae Wilkins which has been offered in evidence. In other words, corroboration and feel it should go to the jury and the jury should consider it for what it is worth.

The Court: May the court see the telegrams as to the names particularly. (The Documents were handed to the court.) The objection will be overruled and they may be admitted. Now the Captain advises the court since they are permanent records of the Alaska Communication System he asks leave of the court to have them removed. I am wondering, in light of that fact, if counsel wouldn't stipulate at this time that the captain may have exemplified copies made and have them substituted in lieu hereof.

Mr. Dunn: No objection.

Mr. Buckalew: No objection.

Mr. Kirkland: No objection.

The Court: They may be admitted with that understanding. Please do not mark them at this time. Does counsel want to read them? [277]

Mr. Kirkland: Yes, Your Honor, I will as soon as they are marked.

The Court: And, Captain. I am wondering if you could probably, during the lunch hour, bring

(Testimony of Doyné K. Martin.)

in a copy of them. A. Yes, sir.

The Court: Very well. You may read them to the jury. Now, let's get them down for the proper identification. Which one do you have as Exhibit No. 4?

The Clerk: He said he wanted them admitted as one. I haven't marked them at all yet.

The Court: Then will you give me the date on the yellow one, please?

Mr. Kirkland: The date, Your Honor, is——

The Court: Let the Captain read it.

A. The one from Portland was received here in Anchorage—it is stamped 1:33 in the morning.

The Court: What is the date?

A. The 2nd of June.

The Court: 1954? A. Yes, sir.

The Court: And the T.M.O., can you advise the court as to that date?

A. The T.M.O. is dated—it was filed at the counter at 11:50 p.m. on the 11th of May, 1954.

The Court: Did you say 1:50, Captain? [278]

A. 11:50 on the 11th of May, that is the T.M.O. The telegram from Portland was sent from Portland on the 1st of June and was received here at 1:33 in the morning on the 2nd of June.

The Court: That T.M.O. was from Yokely to Jordon?

A. The T.M.O. was from James Yokely to William Jordon and the wire was to Mrs. Lena Mae Wilkins from Yakely.

Mr. Kirkland: Ladies and gentlemen of the

(Testimony of Doyne K. Martin.)

jury, I have a T.M.O. and telegram here which has been offered into evidence. The telegram number is 006. Underneath that is KUA 195 UKPC DE UWKC 180Z 24 Nightletter Paid, Portland Org Jun 1. It is addressed to Mrs. Lena Mae Wilkins at 1806 East I St Anchorage. The telegram reads as follows: "Things worked O.K. Margie went to Fairbanks. Received Letter and Phone Message Tell Kirby to Wire Money at Once Will Be There Soon Love Yakely." And then it has identification numbers underneath it. The second telegram—or T.M.O. has the identification symbols on it and reads as follows:

"Pay to: William Jordon

Address: Care ACS

City: Kodiak

Amount: \$Forty-Five and no/100.....45.00

From: James Yokely"

Q. (By Mr. Kirkland): Captain, do you have with you a certain telegram dated on or about May 13, 1954, or a T.M.O., that is?

A. The T.M.O., yes. [279]

Q. \$50.00 to James Yokely, Portland, Oregon, from William Yokely at Anchorage, Alaska?

A. Yes, sir.

Q. And do you also have a telegram dated June 2, 1954, in the amount of \$50.00 to James Yokely, Portland, Oregon, from William Yokely at Anchorage, Alaska?

(Testimony of Doyne K. Martin.)

A. I have one dated June 2, in the amount of \$100.00.

Q. June 2, in the amount of \$100.00?

A. Yes, sir, from William Yokely to James Yokely.

Q. And, Captain, do you have with you a telegram dated on or about June 3, 1954, in the amount of \$150.00 to James Yokely of Portland, Oregon, from one Alvin Placide, Anchorage, Alaska?

A. Yes, sir.

Mr. Kirkland: I am going to offer these into evidence.

The Court: Show them to counsel.

Mr. Dunn: Same objection to them, Your Honor.

The Court: Very well. Same ruling of the court. They may be admitted and marked Plaintiff's Exhibits 5 and 6 or do you want them all together?

Mr. Kirkland: Just have them marked as one, Your Honor, as No. 5.

Mr. Dunn: Point of information, please. The 2 telegrams previously admitted, did the court designate those as 4 and 5?

The Court: No. 4. [280]

Mr. Dunn: 4 alone?

The Court: Yes, at the request of the District Attorney. Now he indicated he would like to have these 3 go in as one, therefore, they may be admitted as Plaintiff's Exhibit No. 5. Do you want to read them at this time, counselor?

Mr. Kirkland: I don't wish to, but I guess I

(Testimony of Doyne K. Martin.)

had better. Ladies and gentlemen of the jury, Government's Exhibit No. 5 reads as follows: T.M.O.—Telegraphic Money Order——

“Seattle

Serial Four Five 45

Pay James Yokely Anderson Hotel Interstate
Ave Portland Org

Rpt James Yokely

One Hundred Dollars 100

FM William Yokely Caution

Dodd”

The next one reads:

“Seattle

Serial Four Seven Six 476

Pay James Yokely Anderson Hotel Interstate
Ave Portland Org

Rpt James Yokely

Fifty Dollars 50

FM William Yokely Caution

McClain”

And the next one is:

“Serial Six Eight 68 [281]

Pay James Yokely Anderson Hotel Portland
Org

Rpt James Yokely

One Hundred Fifty Dollars 150

FM Alvin Placide Caution

McClain”

(Testimony of Doyne K. Martin.)

Q. (By Mr. Kirkland): Captain, do you know whether or not the parties who actually signed these sent those telegrams?

A. I have to assume that they did.

Q. You have no personal knowledge?

A. No, I don't. It is more or less like sending a registered letter. In other words, you assume it got there unless you hear, for example, if they came in and said they had reason to believe they didn't send it then we would go through and check it.

Mr. Kirkland: No further questions.

The Court: You may cross-examine.

* * *

Cross-Examination

By Mr. Buckalew:

Q. Captain, I want you to look at that application for money order and tell me whether or not you can tell from the application who was on duty the night that application was [282] filled in?

A. I have 3. You mean——

Q. The one that I showed you there.

A. Yes, that would be Mrs. Mikelson.

Q. That application shows who sent the money?

A. Yes, sir.

Q. Who sent——

A. This is the application the party made when he sent the wire, or made application to send the wire.

Q. Who was the applicant?

A. Mr. William Yokely.

(Testimony of Doyne K. Martin.)

Q. Now, Captain, can you tell me whether or not it would be possible for a woman to come in and make application and sign a man's name without some sort of notation being made on the application?

A. It would be very unlikely. Normally, on these T.M.O.s, for example, if a lady came in and signed a man's name then the counter clerk at that time would say that you would have to sign it then by so and so. In other words, there would have to be 2 names on the telegram.

Q. Do you know whether or not that is the general office practice in the A.C.S. office?

A. Yes, sir, it is.

Q. Will you find the other wire application?

A. I have 3. [283]

Q. Do you have another one signed William Yokely? A. Yes, sir, I do.

Q. Is it countersigned by Lena Mae Wilkins?

A. No, sir.

Q. How is that application signed?

A. It is signed William Yokely.

Q. And who was the girl on duty when that application was taken? A. Mrs. Mikelson.

Q. That is the same lady that was on the desk on the other one? A. Yes.

Q. Was her name at that time something else?

A. Yes, it was Thelma Conklin.

Q. Does her name appear on the application?

(Testimony of Doyne K. Martin.)

A. No, just her check up in the upper left-hand corner—T.C. which indicates it is Thelma.

Q. If she signed one now it would be T.M. instead of T.C.?

A. I think she still uses her T.C. It is just a matter of identifying who took the order.

Q. Will you examine this other application for a money order and who made that application?

The Court: I wonder, counselor, if you wouldn't identify it so——

A. This is the one from Alvin Placide to James Yokely, Anderson Hotel, Portland, Oregon, for \$150.00 and it is dated June 3. [284]

Q. Now, Captain, does the same rule apply to this wire that is applied to the other applications?

A. It is the general rule on all telegraphic money orders. By the way, you asked me the question—this was always taken by Mrs. Mikelson.

Q. Now, if Lena Mae Wilkins had sent that money she would have had to sign "By Lena Mae Wilkins"? A. That is right.

Mr. Buckalew: Thank you, Captain.

The Court: Mr. Dunn, do you have any cross?

* * *

Cross-Examination

By Mr. Dunn:

Q. I am speaking now of Plaintiff's Exhibit No. 4, Captain, which consists of 2 Telegrams, and one of which reads as follows: "Pay William Jordon

(Testimony of Doyne K. Martin.)

care ACS Kodiak Alaska Rpt—repeat I suppose it is—William Jordon forty-Five Dollars 45.” Do you know who William Jordon is?

A. No, sir, I have no idea.

Q. Do you know whether or not he got this money?

A. I assume that he did.

Q. Would it have been likely? [285]

A. Yes, very likely.

Q. Would it have been likely that a female person would have received that money?

A. No, sir.

Q. That again is in keeping with the policy of your office?

A. That is right, we require identification.

Q. Well, do you require the same identification with respect to the sending and receiving of telegrams as distinguished from telegraphic money orders?

A. No, sir, not the same as we do with telegraphic money orders.

Q. The policy of the office is to be less strict where money is not involved?

A. That is true. That is general, however, we generally are sure that the recipient of the telegram is the party to whom it is addressed to.

Q. Didn't I understand you to testify earlier that the policy of your office was to assume that the addressee receives the telegram and that the sender sends it unless something unusual is brought to your attention?

A. That is right.

Q. Now, I call your particular attention to this

(Testimony of Doyne K. Martin.)

telegram addressed to Mrs. Lena Mae Wilkins and signed Yakely. Is it your testimony that your office assumes that a person by the name of Lena Mae Wilkins received this telegram and further that your office assumes that a person by the name [286] of Yakely sent it?

A. Well, first of all we assume Yakely did send it because it is signed by him. That is a carbon copy which shows it was processed through our communications center, and as to positively saying she did or did not receive it, I believe we could possibly check our delivery sheets. If there is an address on it, it may have been delivered.

Q. But at the present time all you can do is assume, is that right? A. That is right.

Q. Answer this question, if you will, Captain. Do you assume that Yakely and not Yokely sent this telegram?

A. I am not assuming that at all. I mean, I don't know. I have no idea. All I know from my assumption is that a man named Yakely sent that telegram. That is the way he signed it.

Q. Therefore, it would be Yakely and not Yokely, is what your assumption would be?

A. That is the signature on the T.M.O.—Yakely.

Mr. Dunn: Thank you, Captain. No further questions.

The Court: Any redirect?

Mr. Kirkland: No redirect.

The Court: Thank you, Captain. You may be excused.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: Call Mr. Gilbert R. Buckles. [287]

GILBERT R. BUCKLES

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. Will you state your name, please?

A. Gilbert R. Buckles.

Q. Your occupation, sir?

A. I am Station Manager of Pacific Northern Airlines.

Q. And you were subpoenaed to appear here to-day and received a subpoena duces tecum? In other words, ordering you to produce certain documents? A. Yes, sir.

Q. Mr. Buckles, do you have with you your records pertaining to ticket No. 272-32269 dated April 15, 1954, issued to Mickey Wilkins on a flight from Anchorage to Kodiak, Alaska?

A. Yes, sir, I do.

Q. May I see that, please?

Mr. Kirkland: I offer this in evidence.

Mr. Dunn: Does counsel intend to offer all these instruments or only this one?

A. That is the complete record for that flight. We don't tear that apart.

(Testimony of Gilbert R. Buckles.)

Mr. Dunn: Your Honor, the name Wilkins appears on only 2 of these instruments and I object to all the others on the [288] ground they are irrelevant. I don't see, as a matter of fact, even why counsel wants them offered.

The Court: The witness has testified that that is the complete document. They don't like to tear them apart.

Mr. Dunn: I didn't hear the latter part of his testimony. I think, Your Honor, probably you are going to ask for copies to be made. I assume he wants to keep these.

A. I could leave those here during the trial.

Mr. Dunn: I, therefore object to copies being made and offered of anything other than the last 2 pages on the ground of relevancy and with respect to the last 2 pages again the best evidence rule, Your Honor.

The Court: Very well. In that respect the objection will be overruled. It may be admitted and the witness will have the right to withdraw these upon his supplying, at some subsequent date, copies of those 2 sheets only.

A. May I say something here?

The Court: Yes.

A. The one sheet there is for flight 16 going to Kodiak. The last sheet is for flight 11 coming back from Kodiak. That is why there are 2 separate lists there.

The Court: I see.

(Testimony of Gilbert R. Buckles.)

Mr. Kirkland: I didn't lay the foundation. I didn't realize the second one was for a flight back from Kodiak. Could I ask him further questions? [289]

Mr. Dunn: Your Honor, you noticed that I made no objection to the foundation being laid which I knew counsel could lay.

The Court: May I inquire, Mr. Buckles, whether or not you could let those sheets remain with the court? A. Yes, sir.

The Court: Do you have other copies?

A. We have them in our accounting office.

The Court: Therefore, these could remain with the court's file in this case? A. Yes, sir.

The Court: That being the case, counsel, it would appear the purpose could be served by letting the entire document go in if you haven't any objection to it. I would suggest to you, Mr. Kirkland, you only read that portion that is germane to the issues. I am sure Mr. Dunn and Mr. Buckalew will stipulate that only that portion may be read.

Mr. Dunn: Subject to our objection.

The Court: Yes, that is correct. Very well.

Mr. Kirkland: Before I read this, Your Honor, I would like to ask 2 questions.

Q. (By Mr. Kirkland): Now, do you have records on a flight for ticket No. 311-75810 issued in the name of Lena Mae Wilkins on or about May 12, 1954, to travel from Kodiak to Anchorage? [290]

A. Yes, sir, we have here listed on our manifest, flight 11, of May 12. from Kodiak to Anchorage.

(Testimony of Gilbert R. Buckles.)

The Court: Could you, counselor, please give me that number again?

Mr. Kirkland: 311-75810.

The Court: Thank you. That will be marked then Plaintiff's Exhibit No. 6, and it may be read at this time.

Mr. Kirkland: Ladies and gentlemen of the jury, the last page here reflects the name "Wilkins, Mickie;" "1" for the number of pieces of baggage; total weight was 40 pounds and—frankly, I don't know how to read this too well—well, it says, "Departure time 8:45 a.m. Flight No. 16 on April 15, 1954." The second page is for Flight No. 11 on May 12, 1954; departure time, 5:40 p.m.; plane No. 465; ticket No. 311-75810; the name Lena Mac Wilkins; designation, Anchorage; number of pieces of baggage is 1; and weight is 40 pounds.

Mr. Kirkland: Your witness.

The Court: You may cross-examine.

Mr. Dunn: No questions, Your Honor.

Mr. Buckalew: No questions, Your Honor.

The Court: Thank you. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: Your Honor, I am looking for Mr. Fell, a representative from the airlines. He was under subpoena. [291]

The Court: From what company?

Mr. Kirkland: Alaska Airlines. He has been in

court all along, but I haven't seen him this morning. It is about recess time then possibly I can call another person.

The Court: Very well. Court will stand in recess for 10 minutes.

(Whereupon, at 11:10 o'clock a.m., following a 10-minute recess, court reconvenes and the following proceedings were had:)

The Court: Mr. Kirkland.

Mr. Kirkland: If the court please, I will call Deputy Marshal Johnson now. The witness, Mr. Fell, has been present in court every day up until today and we have requested the Marshal go to his home. He doesn't have a phone there and he has 3 days off.

The Court: I see.

Mr. Kirkland: Now, counsel might possibly stipulate—he will only be introducing the records—I have the records myself down in the office and counsel might stipulate that they go in without calling the witness and saying he was employed by Alaska Airlines and so on.

Mr. Dunn: We want to examine them, of course, Your Honor.

The Court: Very well.

Mr. Buckalew: We will probably stipulate to it, Your [292] Honor, but we will have to look at the records.

The Court: Very well. Maybe Mr. Plummer can go down and get them and while they are in the process of that this witness may be sworn.

OLAF JOHNSON

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. State your name, please?

A. Olaf Johnson.

Q. Your occupation?

A. Deputy United States Marshal.

Q. And how long have you been a deputy United States Marshal in Anchorage, Mr. Johnson?

A. 2 years.

Q. Mr. Johnson, do you know where the defendant Lena Mae Wilkins resided during the month of March this year, 1954?

A. She resided with Marvin Clark.

Q. And do you know where she was residing during the month of April, 1954?

A. 1806 East "I," Yokely's house.

Mr. Kirkland: Your witness.

Mr. Buckalew: No questions. [293]

Mr. Dunn: No questions.

The Court: Very well. That is all. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call you next witness.

Mr. Kirkland: Mr. Plummer has gone down to get the next witness and that will be the close of the Government's case.

The Court: Very well. I wonder if, Mr. Buckalew and Mr. Dunn, you would mind consulting with the District Attorney concerning the admissibility of this evidence.

(Thereupon, counsel had a discussion out of hearing of the jury and the reporter.)

Mr. Dunn: Your Honor, we have no objection to this being admitted by virtue of the fact the witness to identify the same is absent, but I do repeat my best evidence objection.

The Court: Very well. There being then no more objection than that the objection will be overruled and it may be admitted and marked Government's Exhibit No. 7. How many sheets does that comprise, Mr. Kirkland?

Mr. Kirkland: Your Honor, there is only one sheet we are interested in. This appears to be the whole booklet. Possibly we can put a marker in and put the booklet in in its entirety and tape the other parts down, if counsel desires.

The Court: Very well. What date is on that, counselor?

Mr. Kirkland: This is the manifest for April 11, 1954.

The Court: Where is it from? [294]

Mr. Kirkland: This is from Anchorage to Fairbanks; ticket No. 11616; the passenger name being James Yokely.

The Court: Thank you.

Mr. Kirkland: The Government rests, Your

Honor. I think this is sufficient, my reading to the court will suffice to the jury.

The Court: Very well. That being the case then the defendant may call their first witness.

Mr. Buckalew: Your Honor, I would like to argue a motion at this time.

The Court: Very well. Ladies and gentlemen of

The jury, you may be excused to retire to the jury room while counsel argues a motion to the court.

(Whereupon, the jury was excused and left the courtroom and the following proceedings were had.)

Mr. Buckalew: Your Honor, on behalf of the defendant James Taylor Yokely, I would like at this time to move that the indictment be dismissed for the reason that the Government's case is built around an out-of-court statement by co-defendant Lena Mae Wilkins. Now, His Honor knows that any of the contents of an out-of-court statement are inadmissible against the defendant Yokely. His Honor will give the jury, I am sure, an instruction to disregard the statement. In other words, the statement is admissible against Lena Mae Wilkins, but is not competent evidence against James Taylor Yokely. That is all the Government presented. There [295] is no other evidence outside of that statement that shows any conspiracy on the part of James Taylor Yokely at all. There is one thing that I should point out to His Honor, and I think His Honor should consider it when he considers the motion, if His Honor will examine the statement

very quickly you will see that in the statement the co-defendant states that she sent certain sums of money through A.C.S. and that she signed the name, James Kirby Yokely. Now, His Honor heard the Government's own witness, Captain Marten, testify that it was a practice down there that if a woman sent money and signed a man's name it would have to have a counter signature. Now, that is just one of the things that I want to point out to His Honor.

I don't think that there is any evidence at all against James Taylor Yokely, and when you consider the out-of-court statement is not competent evidence against James Taylor Yokely the Government has got nothing. There is nothing to go to the jury.

The Court: Are you through?

Mr. Buckalew: Yes, I am.

The Court: Motion denied.

Mr. Dunn: If the court please, I thought Mr. Buckalew was going to make that on behalf of both defendants, although he didn't tell me. I just misunderstood. I would like to make the same motion on behalf of the defendant Lena Mae Wilkins and I base my motion on this: It seems to me, and this, of course, will be the substance of my argument to the jury, that the government [296] has proved practically everything, although it hasn't yet been rebutted, except that these people did in fact conspire. The Government has proved that they moved around from place to place. The Government has proved that they knew each other and that the defendant Wilkins had rented a room in the house with the

defendant Yokely, and the Government has proved that James Taylor Yokely has received money from a number of sources. The Government has not proved that there was any conspiracy or any plan which took place between these 2 individuals prior to that movement or prior to the sending of the money. The Government has to prove 2 things: That the individuals did conspire together and thereafter committed one or more overt acts to effect the object of the conspiracy. Now, they have proved, subject to rebuttal, of course, a number of acts, but I don't see where they have offered any evidence that these 2 people did in fact conspire together, and Your Honor might—well, the court has ruled on that point. I will rest with what I have said, Your Honor.

The Court: Very well. I call your attention to *Corpus Juris Secundum*, Volume 15, at page 994 under the heading of "Conspiracy" and also call your attention to Section 92, at page 1145, concerning the question of overt acts. The point you make, Mr. Dunn, that "Although in the absence of statutory changes it is not necessary for the purpose of rendering a person criminally liable to prove that any overt acts were done in pursuance of the conspiracy, the common-law offense being complete when the [297] combination was formed and the agreement entered into; such acts may, nevertheless, be shown since from them an inference may be drawn as to the existence and object of the conspiracy." Based upon the law your motion is denied. You may recall the jury.

(Whereupon, the bailiff recalls the jury, the jury returns to the courtroom and the following proceedings were had.)

The Court: Let the record show that all the jurors are back and present in the box. You may call your first witness.

Mr. Buckalew: Call William Yokely.

The Court: Before proceeding I would like the record to show that the court referred to the subject "conspiracy" as a whole when I referred to the law and on Mr. Dunn's point specifically. That one point I think you understood it to be such.

Mr. Dunn: Yes, Your Honor.

The Court: Mr. Yokely may come forward and be sworn.

WILLIAM KIRBY YOKELY

called as a witness for and on behalf of the defendants, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Buckalew:

Q. Will you state your name, please, sir?

A. William Kirby Yokely.

Q. Mr. Yokely, sometime during the latter part of May, 1954, did [298] you wire some money to your brother, James Taylor Yokely, in Portland, Oregon?

A. I did.

Q. Did you send 2 wires? A. I did

Q. What were the amounts of those?

A. One was \$50.00 and one was was \$100.00.

(Testimony of William Kirby Yokely.)

Q. Now, was Lena Mae Wilkins living in the house? A. At the time she was.

Q. Does your brother have a rooming house down there? A. Yes.

Q. Lena Mae was living there? A. Yes.

Q. Did Lena Mae advise you to send the money?

A. No, she didn't.

Q. Whose money did you send down there?

A. My money.

Q. Do you know whether or not Lena Mae Wilkins ever gave James Taylor Yokely any money?

A. Not to my knowledge.

Mr. Buckalew: Your witness.

The Court: You may cross-examine. [299]

Cross-Examination

By Mr. Kirkland:

Q. What is your occupation, Mr. Yokely?

A. I didn't understand.

Q. What is your occupation?

A. Bartender and hod carrier.

Q. Are you presently employed, sir?

A. Well, the year round—in the summer time I am a hod carrier and in the winter time I am a bartender.

Q. Have you ever been convicted of a crime?

A. No, I haven't.

Q. Have not? A. No.

Q. Misdemeanor or felony?

(Testimony of William Kirby Yokely.)

A. Misdemeanor.

Q. Have you ever been convicted of a crime includes a misdemeanor as well as a felony.

A. Yes.

Q. You have?

Mr. Dunn: I object again as I previously have. Unless I am sadly mistaken, Your Honor, the proper question is "Have you ever been convicted of a felony," not of a crime. The 2 are different.

The Court: I am afraid counsel is in error in that respect. Objection overruled. [300]

Q. And you are the brother of the defendant James Taylor Yokely? A. I am.

Q. What crime have you been convicted of, sir?

A. It was juvenile delinquency.

Q. Anything other than that? A. No.

Q. How old are you, sir? A. 27.

Q. And you live at the house with your brother?

A. I do.

Q. How much rent was he charging Lena Mae Wilkins for the room?

A. I think the rent was \$20.00 a week.

Q. And did you work this summer as a hod carrier? A. Yes.

Q. How much time did you put in, sir?

A. Oh, practically the whole summer.

Mr. Buckalew: I don't think this is relevant. I mean, it is just taking up the court's time. That is the only reason I am objecting.

The Court: Well, objection overruled. This is cross-examination.

(Testimony of William Kirby Yokely.)

Q. Did you work steady this summer as a hod carrier? A. Yes, I did.

Q. And where do you tend bar, sir?

A. I tend bar at the H & M Barbecue and Texas Playhouse. [301]

Q. Do you tend bar down at the H & M now?

A. No, I have a bar myself.

Q. You have a bar?

A. It is a partnership.

Q. And is Mr. Dungee employed by you?

A. No, he isn't.

Q. Was he employed by you?

A. No, he wasn't.

Mr. Kirkland: No further questions.

The Court: Any redirect?

Redirect Examination

By Mr. Dunn:

Q. Mr. Yokely, do you recall the circumstances under which the defendant Wilkins rented a room at the home of the defendant Yokely?

A. Yes.

Q. Who rented her that room?

A. I did.

Q. You did that yourself? A. Yes.

Q. Did your brother have anything to do with it at all?

A. He wasn't there at present. [302]

Q. He wasn't even at the house? A. No.

Q. Was he in town,

A. I presume he was.

(Testimony of William Kirby Yokely.)

Q. Now, the District Attorney asked you about previous trouble you had in connection with felonies and misdemeanors. How long has it been since you have been in any trouble?

A. That was in 1942, I believe.

Q. You haven't been in any trouble then for about 12 years?

A. That is right.

Mr. Dunn: No further questions.

Mr. Kirkland: I have one or 2 further questions.

The Court: Very well.

Recross-Examination

By Mr. Kirkland:

Q. Mr. Yokely, when you say you rented the room to Lena Mae——

A. I did.

Q. ——did you inquire of her what her occupation was?

A. No.

Q. Do you know whether or not she was employed?

A. No.

Q. Did she have visitors in her room? [303]

A. Well, I mean, I wouldn't know. I worked at night. I wouldn't be there from about 7:00 o'clock until maybe 6:00 or 8:00 o'clock in the morning.

Q. Is that house a bawdy house?

A. No.

Q. Has anyone ever been arrested in that house charged with maintaining a bawdy house?

Mr. Dunn: Objection, your Honor. It couldn't possibly be a proper question. It is going again to my objection of being convicted of a crime. Counsel has some leeway and he is just broadening it.

The Court: In that respect the court was read-

(Testimony of William Kirby Yokely.)

ing a note from the secretary. Would you please read the question back?

(Thereupon, the reporter read the question
Line 6 above.)

Mr. Dunn: Let him ask the witness whether or not this witness has ever been arrested there. He can do that, I suppose, under the court's ruling, although I think it is an improper question, too.

Mr. Kirkland: I am not trying to attack this witness' integrity. Counsel brought out how he rented the room, etc., and I then wanted to go into detail surrounding the renting of this room. I then asked this witness if that house was a bawdy house and his answer was, no. I then asked him if anyone had been arrested out of that house and charged with maintaining a bawdy house at that particular address. [304]

The Court: Objection overruled. You may answer.

Mr. Buckalew: Your Honor, could I make an objection?

The Court: You may.

Mr. Buckalew: I object to the question on this ground that he hasn't established any time certain and he asked, "has that house ever been a bawdy house." Well, we ought to know how long the house belonged to James Taylor Yokely; how long he has been there. It is possible when the house was first built it belonged to somebody else and might have been a bawdy house. I don't know.

(Testimony of William Kirby Yokely.)

The Court: I agree with you in that respect, counselor, but isn't that the prerogative of re-redirect examination?

Q. (By Mr. Kirkland): Did Mary White live at that address, Mr. Yokely, in January of this year? A. Mary White?

Mr. Dunn: Objection, your Honor. It is irrelevant.

The Court: Well, did you answer the other question as to whether or not——

Mr. Kirkland: No, I don't believe he did.

The Court: That is correct, so let's keep the record straight.

Mr. Buckalew: Your Honor, I would like to say one more thing. If it was a bawdy house I think we can take judicial notice of the court's files and see whether or not the place has been abated or any action has been taken against it by the United States [305] Attorney's office.

The Court: I do feel, Mr. Kirkland, that Mr. Buckalew has a point. You ought to confine that to a time so they would know and not have to consume the time of the court and the jury on re-redirect to establish that fact.

Mr. Kirkland: Very well.

Q. (By Mr. Kirkland): Will you answer my first question, during the year 1954 has anyone ever been arrested out of that house or in that house for maintaining a bawdy house there?

A. Not to my knowledge.

Q. Did Mary White live there?

(Testimony of William Kirby Yokely.)

A. Mary White?

Mr. Dunn: Objection, your Honor. It is irrelevant.

The Court: I think it is just testing him. Objection overruled.

A. Not to my knowledge. I don't know.

Q. Well, did she work out of the house then?

A. No one worked out of the house.

Q. Well, to be more specific, on January 15, 1954, was she arrested by Deputy United States Marshal Olaf Johnson charged with maintaining a bawdy house?

Mr. Buckalew: Your Honor, he stated he didn't know. He answered the question.

A. Not to my knowledge. [306]

The Court: All right, he has again answered the question and says not to his knowledge, therefore, the ruling of the court would be useless because the witness has already answered.

Mr. Kirkland: No further cross.

The Court: Any re-redirect, counselor?

Mr. Dunn: No question, your Honor.

The Court: Very well. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Dunn: I would like to call Mr. Burge, your Honor.

The Court: Mr. Burge, may come forward. Let the record show this is the same Mr. Burge who

testified in the presence of the court and not in the present of the jury and before doing so he was sworn under oath, therefore, does not have to be sworn again.

RICHARD W. BURGE

called as a witness for and on behalf of the defendants and having previously been duly sworn, testifies as follow on:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Richard W. Burge.

Q. Mr. Burge, do you know the defendant Lena Mae Wilkins? [307]

A. I do.

Q. How long have you known her?

A. Between a year and a half and 2 years, approximately 2 years.

Q. Now, did you have occasion to see the defendant Lena Mae Wilkins on the morning that James Taylor Yokely was arrested and eventually brought into this court in this action?

A. Yes, I saw her the morning that—I don't know what time it was—it was somewhere around noon, I think. He was brought in in the afternoon.

Q. Well, tell the court and the jury, if you will, what you observed concerning the behavior of Lena Mae Wilkins when you saw her? How she acted?

A. Well, I was going down the corridor to the Commissioner's office——

Q. Is that the Federal Building?

(Testimony of Richard W. Burge.)

A. Federal building. This building, and just as I reached the second door of the United States Attorney's office, Officer Pass stepped out and I stopped and spoke to him and he spoke. Then Lena Mae came out and, I think, Mr. Fitzgerald and F.B.I. Agent Sachen. I think the 4 of them were all there. As Lena Mae came out she said, "Hello, Mr. Burge," and I said, "Hello, Mickie."

Q. You say you have known this defendant about a year and a half or 2 years?

A. I have, yes. [308]

Q. Does she usually call you Mr. Burge or does she usually call you Richard?

A. She usually calls me Richard.

Mr. Kirkland: Objection. Immaterial.

The Court: Objection overruled.

Q. Now, is there any particular time at which she calls you Mr. Burge rather than Richard?

A. It is generally when I run across her around the bars and she is drinking. She gets—I don't know, kind of polite or formal. I can generally tell when she is drinking or kind of upset by her formal actions towards me, a lot of respect or something.

Q. Is it your testimony, Mr. Burge, that the defendant Lena Mae Wilkins calls you Mr. Burge when she is drinking and calls you Richard when she is sober?

A. She does, yes.

Q. Will you continue your testimony, please.

A. I continued down the corridor to the Commissioner's office and I go in. I met Mr. Buckalew

(Testimony of Richard W. Burge.)

in there and he asked me if I was in trouble. I told him, no, that I was down to see about a bond. He asked me if I knew this girl over there and I said, "Yes, I know her," so he said, "Well, I think it is one of my clients," and I said, "I am down here to see about a bond." At that time I saw the Commissioner come from behind a desk. He went over to the east end of the [309] building near the windows. There is a table there near those books—index books, precinct books—and I didn't hear all he was saying, but I did hear him ask Lena Mae if she knew what was in——

Mr. Kirkland: I object to this, your Honor, as being hearsay. I suggest counsel ask questions. I have no opportunity to object when the witness narrates.

The Court: Objection sustained. Counselor, I think you should instruct the witness not to testify in narrative form, but to answer your questions.

Mr. Dunn: As the court wishes. I was simply trying to give him leeway to speed it up.

The Court: I realize that, but counsel objected and the court has no other choice than to rule on the objection.

Q. (By Mr. Dunn): Mr. Burge, did you walk behind the defendant Wilkins to the Commissioner's office? A. I did.

Q. How did she walk, steady, or how?

A. She walked kind of pert. It wasn't her normal gait.

Q. She walked abnormally? A. Yes.

(Testimony of Richard W. Burge.)

Q. Did she stagger?

A. No, I didn't notice her staggering.

Q. Well, after you saw her in the Commissioner's office did you [310] see her any place else that day?

A. About 30 minutes later, yes.

Q. Where did you see her then?

A. At East Chester Flats at Yokely's house.

Q. How was she acting at that time?

A. Very profane, abusive and vulgar.

Q. Well, were you so situated in front of Yokely's house that you could observe the defendant Wilkins closely?

A. Yes, I was very near.

Q. Was she drunk or sober?

A. Well, I don't even know whether she had been drinking, but she was acting abnormal. Just a personal opinion, I figured she was drunk or she was under the influence of something.

Q. You don't know whether it was whiskey or something else? A. No, I don't.

Q. But she did appear drunk?

A. She appeared drunk, yes, under the influence of something.

Q. Did you have any conversation with Mr. Sachen of the F.B.I. concerning the arrest of Yokely sometime after the arrest took place?

A. I did.

Mr. Kirkland: Object to it as being immaterial.

The Court: Objection overruled.

Q. Please tell the court what that conversation was? A. Well—— [311]

(Testimony of Richard W. Burge.)

The Court: I think counsel should state the time, place and who was present.

Q. State the time and place the best you can?

The Court: And also who was present.

A. Well, I was alone when I met him just inside the door of the Post Office in this building.

Q. Was this subsequent to the arrest of Yokely?

A. Well——

Q. Was this after Yokely was arrested?

A. It was. Yokely was in jail at the time.

Q. About how long after Yokely was arrested?

A. About a week, I think.

Mr. Kirkland: Object again on the ground it is immaterial. It happened after the arrest.

Mr. Dunn: I think the court knows the materiality of it.

The Court: The court feels that—the conversation took place between one of the Government's witnesses and this witness, therefore, it is admissible. As to the value to be placed upon it, that is a question of fact for the jury to determine. Objection will be overruled.

A. I met him just inside the door coming into the Post Office. I spoke to him and he spoke to me and he said, "You know, I should have put a bullet in your friend's head," and I said, "Who is that?" and he said, "Jim Yokely," and I said, [312] "Well, it was aggravated assault," and he said, "But we don't protect criminals," and I said to him, "I know the Bureau was an investigating body, but there was also a City officer there and I do know it

(Testimony of Richard W. Burge.)

is his duty to prevent crimes as well as apprehend criminals," and he said, "Well, you boys are going to know a lot about me when I get through investigating down there," and I said, "Well, I wouldn't because as far as you are concerned I am a law-abiding citizen."

Mr. Kirkland: Now, your Honor, I object to any such testimony as that on the grounds it is immaterial and irrelevant.

The Court: Objection overruled. The amount of value the jurors want to place on that particular type of testimony is entirely up to them and it is admissible under the law as the court understands it, therefore, the objection will be overruled.

Q. Did you actually see Mr. Sachen arrest the defendant Yokely?

A. Well, Mr. Sachen—I will put it this way if you don't mind—Mr. Sachen and I were standing just outside the door when Officer Pass came out of the house with Yokely and Yokely was trying to get them to carry Lena Mae away and Mr. Sachen told him to come on and get in the car and Lena Mae walked past me and was cussing him and talking to him about what he couldn't do or something and he turned around and hit her and she fell back towards me. I stepped out of the way and Sachen grabbed Yokely from the rear and pushed him on towards the car and put him inside the car. [313]

Q. Did he have any trouble getting him into the car?

A. No, after he caught him from the rear he

(Testimony of Richard W. Burge.)

turned him on around to the car and got on in the car and sat down.

Q. Did Mr. Sachen reach for his gun?

A. No, he didn't.

Mr. Dunn: No further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Kirkland:

Q. Mr. Burge, what did you say you were in the Commissioner's Court for?

A. To see about a bond.

Q. See about a bond? A. Yes.

Q. For who? Yokely or yourself?

A. It was about my bond.

Q. Your bond? A. Yes.

Q. Have you ever been convicted of a crime, Mr. Burge? A. I have, misdemeanor.

Mr. Dunn: Same objection, your Honor.

The Court: Objection overruled. [314]

Q. What crime? A. Mostly gambling.

Q. Any other crimes?

A. Selling whiskey without a license.

Q. Are you a good friend of the defendant Yokely? A. I am a friend of his, yes.

Q. Now, how did you happen to go out to Yokely's house?

A. Well, I went to the H & M and when I looked there were several standing outside and I said,

(Testimony of Richard W. Burge.)

“They are arresting somebody over at Yokely’s,” so I walked across over there. My car was parked in front of the H & M. Mr. Sachen was standing just outside the door and I asked him who was he arresting at Yokely’s.

Q. Now, don’t go too far. I——

A. I went over there to see about someone being arrested. I was going to see about securing a bondsman or making a bond myself.

Q. Has Yokely ever testified in your behalf in any cases?

A. He testified at the Grand Jury, but I don’t know how he testified.

Q. Have you and Yokely been co-defendants in several matters—not several matters—in 2 or more criminal charges?

A. Well, I don’t think 2. I think we were arrested once for gambling together at the V.F.W. Club. Other than that I don’t think I have ever been arrested with Yokely. [315]

Q. Were you a co-defendant with Yokely on charges of neglecting to assist a police officer?

Mr. Dunn: Your Honor, I object to all of this. I think it is improper cross.

Mr. Kirkland: It goes to show friendship.

The Court: Objection overruled. Counsel has a right to show the interest, if any, that the witness may have to any of the defendants, therefore objection is overruled.

A. We were arrested, yes. Yes, we were arrested

(Testimony of Richard W. Burge.)

for failing to aid and assist a Territorial Officer.

I think that was the charge.

Mr. Kirkland: No further cross.

The Court: Any redirect, Mr. Buckalew? Mr. Dunn?

Mr. Dunn: No, Your Honor.

Redirect Examination

By Mr. Buckalew:

Q. Mr. Burge, that last complaint Mr. Kirkland inquired about hasn't that been dismissed?

A. Well, I put up a bond and you handled it for me. You said it was dismissed for lack of merit or something similiar to that.

Mr. Kirkland: What was the question again?

The Court: You may read it back. [316]

(Thereupon, the reporter read the question on line 20, page 316.)

Mr. Kirkland: Mr. Burge, where did you get the idea that the complaint had been dismissed?

A. From my attorney.

Mr. Kirkland: Mr. Buckalew?

A. That is right.

Mr. Kirkland: And now when you say the "last complaint" you mean the last one what? The last complaint you remembered?

A. Failing to aid and assist a Territorial Officer.

Mr. Kirkland: No further questions.

(Testimony of Richard W. Burge.)

Mr. Dunn: No questions, Your Honor.

Mr. Buckalew: No further questions.

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: It is lunch time and that being the case the court feels this is an opportune time to continue the case, therefore, this case will be continued until 2:00 p.m. The court must instruct you not to discuss this case among yourselves nor permit others to discuss it with you. You may now be excused until 2:00 p.m.

(Whereupon at 12:00 o'clock noon, the court continues the cause to 2:00 p.m. of the same day.) [317]

(At 2:00 o'clock p.m., counsel for plaintiff being present and counsel for the defendants being present, the trial of said cause was resumed.)

The Court: You may call the roll of the jury.

The Clerk: Trial jury is all present, your Honor.

The Court: Very well. You may call your next witness then, Mr. Buckalew or Mr. Dunn.

Mr. Dunn: Call Gilbert LaCour, Your Honor.

GILBERT LaCOUR

called as a witness for and on behalf of the defendants, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Gilbert LaCour.

Q. Do you know the defendant Lena Mae Wilkins? A. I do.

Q. Did you know her at the time James Yokely was arrested, the arrest being the matter that eventually brought him into court on the present charge?

A. Well, did I know her personally?

Q. Yes. A. I knew her. [318]

Q. Where are you employed, Mr. LaCour?

A. At the present?

Q. Yes. A. Alaskan Salvage.

Q. Now, at the time of Mr. Yokely's arrest were were you employed?

A. Veteran Cab Company.

Q. Did you drive a cab for that company?

A. Yes, I did.

Q. Now, did you have occasion to see Lena Mae Wilkins on the morning preceding James Yokely's arrest?

A. I saw her that night and early that morning.

Q. How long have you known the defendant Wilkins?

A. Well, I don't know exactly how long I have known her. I have seen her off and on for about 6 months prior to that.

(Testimony of Gilbert LaCour.)

Q. About how many times do you think you have seen her before the evening or morning in question? A. About a dozen times.

Q. About a dozen times. Had you seen her when she was both drunk and sober? A. Yes, I had.

Q. Tell the court what you observed with respect to the defendant Wilkins on this particular morning; how you came to see her and what took place?

A. They called a cab out to the Texas Playhouse that morning. [319] I was dispatched out and she was the one that called a cab. I picked her up and took her to the Flats where she lived. She asked me to wait and she was going to move. She went into the house and started to pick up her clothes and things like that and bring them out to the cab and all the time she kept acting drunk, her tongue was wobbling and she couldn't walk very straight and while in the cab, when I picked her up at the Texas Playhouse, she kept repeating things over to me. Well, I didn't pay any attention exactly to what she was saying. After I let her out she picked up her clothes and brought them to the cab and she went back into the house and then came back out and started taking her clothes out again. She was taking them back into the house and I asked her if she wanted me to help take the clothes in. She had about one load so I picked up a load and took them in the house. I asked her where to put them and she said, "Drop them on the floor," so I layed the clothes on the floor and went back out to

(Testimony of Gilbert LaCour.)

the cab to wait for her. She came out to the cab and said she didn't have enough money to pay the bill so she went back into the house and got the money. She came back out and paid me and said, "That is all I have."

Q. Did she have enough to pay you?

A. She had enough to pay me.

Q. How much did she give you? [320]

Mr. Kirkland: Object. Immaterial.

The Court: What is the relevancy?

Mr. Dunn: It is preliminary, Your Honor. I am going to tie this to another thing subsequently.

The Court: Objection overruled then.

A. Well, the bill was \$4.00 the first time.

Q. And she paid you the \$4.00?

A. She paid the \$4.00. She gave me 4 \$1.00 bills.

Q. Did she give you any tip?

A. Not at that time.

Q. Did she make any comment concerning the tip? A. She didn't make any comment at all.

Q. Now, when you were driving her from the Texas Playhouse to the Flats, you said she was mumbling, did you?

A. She kept saying something incoherent. I couldn't understand what she was saying.

Q. Was she talking to you or to herself?

A. She would talk to me awhile then talk at random to herself more or less.

Q. Approximately what time was that?

A. Approximately 2.00 o'clock that morning.

Q. About 2:00 o'clock in the morning?

(Testimony of Gilbert LaCour.)

A. That is right.

Q. Now, at that time was the defendant Wilkins drunk or sober?

A. She was definitely drunk at that time. [321]

Q. She was definitely drunk at that time?

A. That is right.

Q. Did you see her later on that same night, more exactly the same morning?

A. I did see her again that morning.

Q. And where did you see her and what were the circumstances surrounding that occasion?

A. Well, I picked her up again that morning at the 1042 and she and the band that played at the 1042 got in my cab and wanted to go to the Texas Playhouse.

Q. These places you have mentioned, the Texas Playhouse and the 1042 Club, are those bars?

A. Those are bars—well, you would call them a bar and nightclub.

Q. But they do sell liquor?

A. They sell liquor.

Q. All right. So you picked her up at the 1042 Club?

A. I picked her up at the 1042 Club and the band and took them out to the Texas Playhouse. When they got out there, that is when she was acting pretty jolly with the band and everything and when they got out there she gave me a \$10.00 bill. I told her the fare was only \$2.00 and she said, "Keep the change."

(Testimony of Gilbert LaCour.)

Q. She gave you an \$8.00 tip?

A. \$8.00 tip.

Q. Was she drunk at this time? [322]

A. She was drunk at that time, too.

Q. In your opinion was the defendant Wilkins responsible for her actions at that time?

A. Well, in my opinion she wasn't responsible for anything.

Q. She was pretty drunk?

A. She was pretty drunk.

Mr. Dunn: No further questions, Your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Kirkland:

Q. Now, Mr. LaCour, you testified that you picked the defendant Lena Mae Wilkins up at the Texas Playhouse? A. The first time.

Q. Then took her to her house, is that right?

A. That is right.

Q. Then from there did you testify you took her to the 1042 Club?

A. I did not take her to the 1042 Club.

Q. Did you later pick her up there?

A. Later.

Q. And you took her back to the Texas playhouse? A. That is right.

Q. And you got an \$8.00 tip, is that correct? [323]

A. That is right.

(Testimony of Gilbert LaCour.)

Q. Beg your pardon? A. That is right.

Q. Did you perform any unusual services for the \$8.00 tip?

A. Other than driving a cab from the 1042 Club to the Texas Playhouse.

Q. And is it your testimony that she wasn't responsible?

A. She wasn't responsible for what she did.

Q. And yet you kept the \$8.00 tip. Is that correct? A. I reminded her of it. I says——

Q. Now, did you keep the \$8.00 tip?

A. I did keep the \$8.00 tip.

Q. And you didn't perform any unusual services for her?

A. No, sir. Other than driving her from where she wanted to go to——

Q. Does she call you most of the time to haul her around when you were driving a cab?

A. No, she didn't.

Q. And you just happened to pick her up these three different occasions on this same date?

A. That is right.

Q. Have you ever been convicted of a crime?

A. No, I have never been convicted of a crime.

Q. That includes misdemeanor as well as felony?

A. Right. [324]

Q. Was the defendant soliciting out of your cab? A. No, she did not.

Q. Was not? A. She was not.

Q. An \$8.00 tip was for no unusual services?

Mr. Dunn: Your Honor, now the witness has

(Testimony of Gilbert LaCour.)

answered that and it's rather obvious what the prosecution——

The Court: Do you object?

Mr. Dunn: Yes, sir. Your Honor, I'd like to spell it out because I think it's rather obvious that what the prosecution is trying to do is to infer the direct opposite of what the witness has testified to, and I object on the ground the question has been answered repeatedly.

The Court: On the last ground the court will sustain your objection.

Mr. Kirkland: No further questions.

The Court: Is there any redirect?

Mr. Dunn: None, your Honor.

The Court: That is all. You may step down. Thanks for coming.

(Thereupon, the witness was excused and left the witness stand.)

The Court: You may call your next witness.

Mr. Dunn: Is Alfred Dungee in the courtroom, please?

(No answer.) [325]

Mr. Buckalew: Call James Taylor Yokely.

The Court: Mr. Yokely may take the witness stand.

JAMES TAYLOR YOKELY

called as a witness for and on behalf of the defendants, being one of the defendants, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Buckalew:

Q. State your name, sir.

A. James Taylor Yokely.

Q. You are one of the defendants in this action?

A. I am.

Q. I just want you to relax, Mr. Yokely, and will you tell the jury in your own words how Lena Mae came to the house and what your association was with Lena Mae Wilkins?

Mr. Kirkland: Your Honor, I must object to the request of narrative form.

The Court: Mr. Buckalew, it is highly improper that the witness testify in narrative form. He should be asked questions and should testify from the questions that are submitted to him.

Mr. Buckalew: I didn't know it was highly improper, Your Honor.

Mr. Kirkland: Well, Your Honor——

The Court: Then it is improper. Maybe the court erred [326] by saying highly improper, but it is improper. The court feels that as well as being established over generations the way a witness tes-

(Testimony of James Taylor Yokely.)

tifies is not narration, but in response to questions by counsel.

Mr. Buckalew: All right, your Honor.

Q. Mr. Yokely, do you remember about what date Lena Mae Wilkins came to your house?

A. Well, I imagine it was some place in May, April—in April, I guess it was. First of April sometime along in that neighborhood. I don't remember the exact date.

Q. Now, is it true that you have a rooming house? A. Yes, I have a rooming house.

Q. Now, how many rooms are in the house?

A. Well, right now it has 4 bedrooms, living room and kitchen. I did have 5, but I did some remodeling and cut one of the rooms out and enlarged my living room.

Q. How many tenants did you have in the house when Lena Mae came to live there? A. 3.

Q. Do you remember the names of those people?

A. My brother had one, William Yokely; me and my wife had one and Lena Mae had one.

Q. Now, when Lena Mae came to the house was your wife outside? A. Yes.

Q. How long did Lena Mae stay in the house? [327]

A. How long did she stay there?

Q. Yes.

A. Well, when she first came—my brother rented the room to her and I imagine she stayed there about 4 or 5 days, then she left and went to Fairbanks.

(Testimony of James Taylor Yokely.)

Q. Now, Mr. Yokely, did you send Lena Mae Wilkins to Fairbanks?

A. No, I never sent Lena Mae Wilkins any place.

Q. Did you ever get any money out of Lena Mae other than for rent? A. No.

Q. What kind of person is Lena Mae Wilkins?

A. What kind of person is she?

Q. Yes.

A. Well, when Lena Mae is sober she is an awful nice girl. She is intelligent and everything else when she is sober, but when she is drinking nobody can do anything with her or tell her anything. She is loud and she uses vulgar language and everything else.

Q. Now, just prior to September 7, that is, I believe, the date that the statement was given to the F.B.I., did Lena Mae Wilkins ever talk to you about your going back with your wife or your wife coming back to live there?

A. Well, yes, she did. I will put it this way, when Lena Mae first came to the house there was nobody there but me, my brother and Lena Mae. He was by himself and I was by myself [328] at the time. My wife was in the States. We were separated. And Lena Mae and—I have got a T.V.—I have got a nice comfortable house, you know, and I have a T.V. there and at night sometimes when I came in we would just sit and watch the T.V. and we may have got a little close together, you know, just by being with each other, and I may have given her the wrong impression a little bit maybe. I have

(Testimony of James Taylor Yokely.)

got to admit that she respected me and she thought quite a bit of me and it just went too far. That is all. I didn't think it would go that far.

Q. Now, Mr. Yokely, is it true that Lena Mae Wilkins got pretty sweet on you?

A. I have to admit to that. I believe she did.

Q. What was Lena Mae's reaction when you advised her that you and your wife were going back together?

A. Naturally she didn't like it. I got a phone call from my wife down in Portland and I told her that I was going down there to see her and thought maybe that she and I would reconsider and go back together.

Q. Now, Mr. Yokely, did you have a conversation with Lena Mae Wilkins in your house approximately a week or 2 two weeks prior to September 7?

A. September 7. Is this the time——

Q. That is the time the statement was given?

A. Yes. [329]

Q. Was Lena Mae Wilkins intoxicated on that occasion?

A. Yes, she was—numerous times.

Q. Will you tell the jury what Lena Mae—what the conversation was about?

The Court: Counselor, I think you should establish the time, place and who was present.

Mr. Buckalew: I am trying to as best I can.

The Court: I wish you would ask then there wouldn't be any problem about it.

Q. Who all was present in the house?

A. Who all was present?

(Testimony of James Taylor Yokely.)

Q. Yes. A. Just she and I.

Q. Now——

The Court: What time of day was it?

A. In the evening.

Q. And can you fix the date? How close can you fix the date, Mr. Yokely?

A. Well, I imagine, it was, say about the 24th of August.

Q. All right. Now, what was the nature of the conversation between you and Lena Mae?

A. Well, at first it came up about her. She kept coming in the house drunk and raising, what I would say, a whole lot of sand and using bad language and everything and I told her if she continued it that I was going to have to ask her to move. She [330] was behind on the rent at that time anyhow, so then she tells me, "You can't put me out," so I said, "Well, if you take that attitude I am going to put you out. I said—you are behind in your rent and I have asked you to quit using all that language in here and everything and coming in drunk like that." So then she brought out a threat that she had been talking to some F.B.I. men and I said, "Well, I don't care who you have been talking to. I said—what could you tell them," Then she spoke up and said, "Well, who do you think they are going to believe, me or you," and I said, "It is your business. You can do whatever you want to." And she brought up about she had been—I knew it for a fact that numerous

(Testimony of James Taylor Yokely.)

of times I had seen her in and out of bars and sitting up at the bar with some F.B.I man called Pete Wetzel. In fact, that is who I thought she had in mind when she was talking about that and when this Sachen came down I thought he was Pete Wetzel she was always talking about.

Q. Do you know how Lena Mae was fixed financially when she came to live at your house?

A. She had a little money.

Q. Do you have any idea how much money she had?

A. Well, I am going by what my brother said. He said she had around \$200.00 or \$300.00. How he would know that is when she paid the rent he said she went in——

Mr. Kirkland: I object to that, Your Honor. It is hearsay. [331]

The Court: Objection sustained.

Q. Did Lena Mae Wilkins give you \$8,000.00 in those 2 months she stayed there?

A. Lena Mae Wilkins hasn't given me \$8.00 much less \$8,000.00.

Q. Did you know Lena Mae was going to Fairbanks?

A. She told me she was.

Q. Mr. Yokely, did you have any control at all over Lena Mae Wilkins?

A. None whatsoever. I only tried to demand my rent out of her when rent day was.

Q. If you told her to go to Fairbanks and hustle do you think she would have gone? Could you have sent her up there if you had wanted to?

(Testimony of James Taylor Yokely.)

A. I don't think so. Lena Mae has got a mind of her own.

Q. Do you know whether she worked out of your house or not?

A. I don't believe she did. The only time—you see, it is a known fact that I gamble. The F.B.I men and officers and everybody else know I gamble for a living and I was away from home all the time nights and I did inform her that she couldn't have any practice in prostitution out of my house. If she took anyone there it was when I was not there, but I never heard of any.

Q. Did you conspire with Lena Mae Wilkins to send her to Kodiak?

A. I have conspired none whatsoever with her.

Q. Can you explain to the jury how it is that Lena Mae Wilkins, [332] for example, knew about that wire that your brother sent?

A. The wires that my brother sent?

Q. Yes.

A. Well, when I went to Portland, as I stated, she was the only woman around the house and, naturally, when I left I told her to kind of look out after the house, you know, keep the fire in the kitchen and the hallways clean and everything and I mostly left her in charge of the house as far as upkeep. When I got to Portland—when I left I was short of funds—in fact I had to borrow some money to leave with to go to Portland, and I asked my brother to send me some money if he ever got any so when I got to Portland I sent Lena Mae a wire

(Testimony of James Taylor Yokely.)

and told her that everything was okay, that I arrived okay and that my wife had gone to Fairbanks and for her to tell Kirby to send me some money and as far as the amount, I don't know whether Kirby told her or not, but I imagine he did. Kirby sent me the money then I also sent Alvin Placide a telegram. It seems like the F.B.I. forgot to investigate on that. I sent him a telegram to wire me some money.

Q. Who was Alvin Placide?

A. He was a roommate in my house at that time.

Q. Did you see Lena Mae Wilkins when you were in Fairbanks? A. No, I didn't.

Q. Did you go to Kodiak? Did you see Lena Mae Wilkins in Kodiak? [333]

A. I wasn't in Kodiak when Lena Mae was there. The last time I have been to Kodiak was last year.

Q. Did Lena Mae Wilkins send you any money when you were in Portland?

A. No. No one sent me any money.

Q. How many months did Lena Mae live at your place, Mr. Yokely?

A. Oh, I'd say from about April to when I was arrested and I demanded that they take her out of my house.

Q. How many months is that?

A. Well, 6 months, I guess—5 or 6 months.

Q. Did you take Lena Mae Wilkins to the Airport?

(Testimony of James Taylor Yokely.)

A. I haven't taken Lena Mae any place.

Q. Is it true that Lena Mae Wilkins checked your mail?

A. She picked my mail up at the Post Office several times. It depends upon who leaves the house first. When I would leave the house I would tell her that I was going up town and she would ask me to call for her mail. I get it at general delivery and she asked me to call for her. When she left I in turn asked her to call for mine and make one trip do. She did not check my mail, not to read it, no, but she did pick it up.

Q. Did you know on the morning that Lena Mae Wilkins contacted the law enforcement officers—did you have advance knowledge she was trying to contact them? A. Yes, I did. [334]

Q. And what did you do about it?

A. Layed in bed.

Q. Did you testify that Lena Mae had indicated to you on prior dates she was going to get you?

A. Similar to that, when she brought out the threat about this Pete Wetzal, she had been talking to and she told me who did I think they would believe, me or she.

Q. Now, at the time she made this threat was she talking about Margie? A. Pardon?

Q. Was she talking about Margie?

A. Talking about her? How do you mean?

Q. I mean, was she bitter over the fact you were going back to Margie?

A. She didn't appreciate the fact because, as I

(Testimony of James Taylor Yokely.)

stated, the matter that went on in the house and I may have put her to the wrong impression by the little dealings that did perform in the house between she and I, that we would be together.

Q. Now, Mr. Yokely, how does Lena Mae get when she is drunk?

A. Beg your pardon.

Mr. Kirkland: Object on the ground it is immaterial, your Honor.

The Court: Well, it may have some probative value. Objection overruled. He may testify.

Q. Have you had occasion to observe Lena Mae when she is drinking? [335] A. Yes.

Q. What is her reaction to liquor?

Mr. Kirkland: Objection, your Honor, on the ground it is repetitious.

The Court: Well, objection will be overruled. You may answer.

A. She can't drink at all. Once she starts drinking she just, I would say, is out of her head when she gets to drinking because nobody can say anything to her and even some nights that we would be in the house and just the fact that me by myself and in the house and she by herself and maybe one or 2 nights I would slip in her room or something and have little dealings, but it wasn't no—in other words, I was just mostly satisfying myself. That was all at the house.

Q. How much did Lena Mae drink every day?

Mr. Kirkland: Object on the ground it is immaterial, your Honor.

(Testimony of James Taylor Yokely.)

The Court: Objection sustained.

Mr. Buckalew: Your Honor, I think I can show that it is relevant. I am going to try and establish through this witness she consumed considerable amounts of alcohol over a period of time and that if she drank that much alcohol it would be impossible for her to raise \$8,000.00 as alleged in this statement. Now she is going to really have to hustle and leave that alcohol alone if she is going to get \$8,000.00. [336]

The Court: The court has ruled.

Mr. Kirkland: Your Honor, I think counsel is being facetious in making that statement. He should be instructed not to make any like statements and if he is anxious to testify he should take the witness stand.

The Court: If you make a motion for it to be stricken from the record the court will grant that motion.

Mr. Kirkland: I will, your Honor.

The Court: All right. The court at this time asks the jurors to disregard the statement made by Mr. Buckalew after the court ruled and it may be stricken from the record. You may proceed.

Q. Mr. Yokely, did you testify that your occupation is that of a gambler?

A. I believe the F.B.I. men and police officers can testify to that, too, because they have checked me.

Q. Have you ever been convicted of a felony?

(Testimony of James Taylor Yokely.)

A. Up until when I was arrested I didn't know that I was convicted of a felony. It was in 1945 I was under the impression that it was for receiving stolen property in San Francisco, California. Some boys——

Mr. Kirkland: Your Honor, I object to the witness going in and explaining the crime. He can only testify he was convicted or wasn't convicted. If he is going to explain then I can cross-examine him on all details. [337]

The Court: That is correct, but I point out to you Mr. Buckalew is sponsoring this witness and if he wants to go in and explain it he may do so. Objection overruled.

Q. Mr. Yokely, just answer whether or not you were convicted of that particular crime?

A. No, I pleaded guilty to receiving stolen property.

Q. You have been convicted of gambling?

A. Yes, numerous times.

Q. What did you do before you gambled? Were you a hod carrier?

A. Hod carrier. In fact, I started out right after my father got killed when I was 19 years old.

Q. Have you ever been convicted of violation of the Mann Act?

A. No, I haven't. Never have been involved in it.

Q. Have you ever been convicted of pimping?

A. No, I haven't.

Mr. Buckalew: Your witness, Mr. Kirkland.

The Court: You may cross-examine.

(Testimony of James Taylor Yokely.)

Cross-Examination

By Mr. Kirkland:

Q. Mr. Yokely, in St. Louis, Missouri, in 1941, were you not convicted for the crime of robbery?

A. No, I wasn't convicted of the crime of robbery. I was [338] convicted—just a minute, let me get this straight.

The Court: Take your time.

A. I served 6 months. It was for trespassing, molesting.

Q. What?

A. It was for trespassing, molesting. I think that was the term that they used.

Mr. Dunn: I didn't get the witness.

A. Trespassing, molesting.

The Court: Molesting?

A. Yes.

Q. And in Portland, Oregon, in 1944, you were convicted of vagrancy?

A. I was picked up for vagrancy.

Q. Were you sentenced to 90 days?

A. I was picked up for vagrancy. I went into court for——

Q. Were you sentenced?

A. I can't explain.

The Court: Mr. Yokely, the court will have to instruct you that you must answer the questions and then if you want to explain it your counsel on redirect examination may bring that out.

(Testimony of James Taylor Yokely.)

A. What was the question?

Mr. Buckalew: Your Honor, I would like to object at this time. I think it is improper for Mr. Kirkland to examine this witness on his criminal record from the F.B.I. Kickback Sheet.

The Court: Objection overruled. You opened it up on [339] direct examination, counselor.

A. I don't have any objection of telling my——

Q. (By Mr. Kirkland): Answer the question, please? A. What was it again now?

Q. Were you sentenced 90 days to serve as a result of that conviction?

A. No, I wasn't. I was sentenced to 90 days and they gave me 159 days suspended, providing I left the State of Washington and that was a gambling charge more or less.

Q. Just a minute now. I will ask you the questions. In 1948 at Richland, Washington, were you convicted of vagrancy?

A. Richland, Washington?

Q. Yes. A. 1948?

Q. Yes.

A. I wasn't in Washington in 1948, and never have been to Richland, Washington.

Q. And in 1945 in California you were sentenced to 1 year for receiving stolen property?

A. That is what I was speaking about.

Mr. Buckalew: Your Honor, if he wants to ask——

A. That is the felony that you were asking about.

(Testimony of James Taylor Yokely.)

Mr. Buckalew: I want to object to Mr. Kirkland's making a statement "you were convicted and so on." If he wants to know [340] he can ask the witness a question. I mean, he is testifying. I just want him to put it in the form of a question.

The Court: I think the objection should be sustained. You should ask the question.

Mr. Kirkland: I intended to. I apologize.

The Court: Very well.

Q. Were you convicted of vagrancy in the State of Montana in 1949?

A. No. I was picked up in Montana.

Q. And you didn't pay a \$25.00 fine?

A. I was picked up for investigation.

Q. You didn't pay a fine there?

A. A \$25.00 fine, yes.

Q. You did pay the \$25.00?

A. Yes. I don't remember the sum, but it was a fine. I don't remember the exact sum.

Q. Were you convicted of gambling in 1950 at Anchorage? A. Yes.

Q. How many times?

A. Never was convicted. I think I have pleaded guilty 2 or 3 times.

Q. Same difference. How many times in 1950?

A. In '50?

Q. Uh-huh. A. Once. [341]

Q. Were you convicted for illegal entry on the military reservation in Anchorage? A. Yes.

The Court: What year, counselor?

Mr. Kirkland: In 1951, your Honor.

(Testimony of James Taylor Yokely.)

A. Yes.

Q. Were you convicted of disorderly conduct in 1953 at Tacoma, Washington?

A. Disorderly conduct, no.

Q. Were you convicted of anything on January 18, 1953, at Tacoma, Washington?

A. I was picked up in a gambling place on Broadway. They raided the place.

Q. Were you convicted of gambling and illegal entry on a military reservation in 1954?

A. Yes.

Q. Mr. Yokely, did you testify as to little deals between you and Lena Mae? A. Little deals?

Q. Yes.

A. I was speaking about what went on in the house between she and I. We had little dealings together when we would get to the room.

Q. When you got together with her did you pay her?

A. Never was no money transferred. She never accepted no money [342] from me and I never accepted any from her. It was more of what you would call a love affair.

Q. Just a minute. Your counsel will bring out those things on direct examination.

Mr. Buckalew: He just answered the question fully.

Mr. Kirkland: Beg your pardon.

Mr. Buckalew: That comment was directed to the court, your Honor.

The Court: In that respect counsel examining

(Testimony of James Taylor Yokely.)

the witness have the right to object as to whether or not the answer is responsive to the question. Counsel examining the witness also has the right to state to the witness what kind of answer he wants, yes or no, or whether or not he answered the question, therefore, since he—when I say he, Mr. Kirkland has stated that he didn't want the witness to add anything to it, he has that right and, therefore, the objection will be overruled.

Q. And did you testify that generally you sat around and watched T.V.? A. Yes.

Q. And did you testify that she drank heavily all the time? A. Not all the time, no.

Q. Well, did you testify that she drank heavily most of the time?

A. When she gets to drinking, yes, once she starts.

Q. How long has it been since you have had a job, Mr. Yokely? A. 1942. [343]

Q. 1942? A. Yes.

Q. What kind of automobile do you drive?

A. A Buick.

Q. Do you own your home? A. Yes.

Q. Is the title of your home in your name?

A. Yes.

Q. When Lena Mae Wilkins went to Fairbanks did you loan her your luggage to pack her clothing in? A. No, I didn't.

Q. Did not? A. No.

Q. You do have luggage though? A. Sure.

(Testimony of James Taylor Yokely.)

Q. And did you testify that you didn't see Lena Mae when you were in Fairbanks?

A. I did not see Lena Mae Wilkins in Fairbanks.

Q. You knew she was there?

A. Yes; I heard she was there. In fact, I was pretty sure she was there, yes. I——

Q. You have answered the question. Did you tell Lena Mae that whenever she sent the money to you to use an assumed name, by letter, because you didn't want a Federal investigation? [344]

A. I wouldn't have no cause to tell Lena Mae nothing like that because she wasn't going to send me no money.

Q. Then do you deny receiving \$160.00 in a letter registered to you, registered for \$100.00, in the month of April or May?

A. Yes; I deny receiving \$160.00. I received \$100.00 in a registered mail.

Q. With the return address as Carl Samuels?

A. From Carl Samuels.

Q. But you didn't tell her to do that because you didn't want a Federal investigation?

A. Lena Mae doesn't have nothing to do with that. Carl Samuels sent me this money.

Q. Well, did you send \$45.00 to Bill Jordon at Kodiak?

A. I wired him \$45.00.

Q. And did you wire the \$45.00 to give to Lena Mae?

A. I wired him \$45.00 because he called me up

(Testimony of James Taylor Yokely.)

and asked me to let him have a piece of money. He and I exchanged money all the time.

Q. Now you have answered the question. Now, did you send a telegram to Lena Mae Wilkins reading as follows: "Margie gone to Fairbanks. Everything worked out okay. Will see you soon"?

A. Yes.

Q. Now, where did you send that telegram from?

A. From Portland, Oregon. [345]

Q. From Portland? A. Yes.

Q. Is your house a bawdy house?

A. No; it isn't no bawdy house.

Q. Is not? A. No.

Q. Did you join your wife down in Portland?

A. Yes.

Q. What did you mean in your telegram that "everything is okay. Margie gone to Fairbanks"?

A. What did I mean in the telegram?

Q. Yes. A. That I arrived there okay.

Q. I mean about this part, "Margie gone to Fairbanks"?

A. I just said that. That is all. Everything is okay. I arrived okay. She knew what I was going there for.

Q. Did your wife, Margie, go to Fairbanks from Portland? A. Yes.

Q. Did she have a job there?

A. A job where?

Q. At Fairbanks.

A. Did she have a job in Fairbanks? No. She was down in Portland for a year, I imagine, at least. She was out for a year.

(Testimony of James Taylor Yokely.)

Q. I don't care where she was before, Mr. Yokely. Just answer [346] the questions. Did you buy her ticket to Fairbanks?

A. Did I buy who a ticket?

Q. Your wife, Margie.

Mr. Buckalew: Object on the ground it is immaterial, your Honor.

A. She bought her own ticket.

Q. Well, now, weren't you and your wife, Margie, planning on going back together when you went down to Portland?

A. Were we planning on going back together?

Q. Yes. A. I don't know.

Q. Didn't you testify that you were just a few moments ago?

A. I said after I got down there we may go back together and we got to talking—she called me and wanted to see me.

Q. Well, how long did your wife stay in Fairbanks? A. Oh, 2 or 3 weeks, I imagine.

Q. Is your wife a prostitute?

A. Not as I know of.

Q. Well, you would know about it, wouldn't you, if she were? A. I said, not as I know of.

Q. But you wouldn't say that your wife isn't a prostitute?

A. If I knew it I would say—I don't know. She never practiced in front of me.

Q. Did she ever give you any money?

Mr. Buckalew: Object on the ground it is immaterial. [347]

(Testimony of James Taylor Yokely.)

The Court: What is the materiality, Mr. Kirkland?

Mr. Kirkland: Your Honor, I probably should approach the bench with counsel. I wouldn't want to state the grounds in front of the jury.

The Court: You may do so.

(Whereupon, all counsel approached the bench and the following proceedings were had out of the hearing of the jury.)

Mr. Kirkland: I contend it is material because counsel has brought out testimony about he and his wife going back together and the defendant denies that he maintains a bawdy house.

Mr. Plummer: He also testified that prior to September 7 he told Lena Mae Milkins they were going back together and it was her reaction to that that caused her to turn against him.

The Court: On that basis I think it is material, therefore, the objection will have to be overruled.

(Thereupon, all counsel return to their respective tables and the following proceedings were had.)

The Court: The objection is overruled. Court will stand in recess for 10 minutes.

(Whereupon, at 3:06 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had.) [348]

The Court: Let the record show all the jurors are back and present in the box.

(Testimony of James Taylor Yokely.)

The Clerk: If the court please, the Communications System has provided copies of Government's Exhibits 4 and 5.

The Court: I wonder if counsel would mind checking these copies so they may be substituted in lieu of the originals. The Clerk advises the court that one of the sergeants in the A.C.S. has checked them and it is his opinion that everything checks word for word, however, counsel have a right to check further if they so desire.

Mr. Buckalew: Your Honor, I don't see any point in checking them. It is certified by Captain Martin and that is good enough for me.

The Court: Very well. Then, there being no objection, the copies certified to as being made of the wires that they have in the office of the Alaska Communications System may now be substituted for Government's Exhibits 4 and 5, respectively, and at this time the court would ask the clerk to substitute the numbers to the respective certified copies and to return the copies given by the A.C.S. back to Captain Martin or to some duly authorized representative. You may proceed then, Mr. Kirkland.

Q. (By Mr. Kirkland): Mr. Yokely, did you testify that you joined your wife down in Portland?

A. Yes. [349]

Q. Now, how long had your wife been in Portland?

A. Well, I think she told me she had been there 3 or 4 months.

(Testimony of James Taylor Yokely.)

Q. Did she have a job down there?

A. Not that I know of.

Q. Did your wife own a Cadillac at that time?

A. She owns one now.

Q. She still owns one? A. Yes.

Q. Is your wife also known as Rusty Swanson in Portland? A. I think so.

Q. You think so. Did you stay at the Anderson Hotel with your wife in Portland? A. No.

Q. You did not? A. No.

Q. Where did you stay?

A. At the Anderson Hotel by myself.

Q. At the Anderson Hotel by yourself?

A. Yes.

Q. When did your wife leave Anchorage to go to Portland?

A. When we separated. She didn't leave Anchorage going to Portland. She left Anchorage going home after we separated.

Q. What year was that?

A. I think it was June, '53. I got a mortgage on my home. She and I decided to bust up and I borrowed some money on my home [350] and gave it to her.

Q. Just answer the question now. Mr. Yokely, did you file income tax return for the past year?

Mr. Buckalew: Object on the ground it's immaterial. He is not charged with tax violation of any kind.

The Court: What relevancy, counselor?

(Testimony of James Taylor Yokely.)

Mr. Kirkland: I think it would go to credibility, your Honor.

Mr. Buckalew: Go to credibility?

The Court: Under what theory of the law?

Mr. Kirkland: Well, if the man's not complied with the duty—I don't know whether he did or not—if he hasn't complied with the duty that is imposed upon him to carry out and he's driving automobiles, traveling all over the country, I certainly think it should go towards his credibility.

Mr. Buckalew: Your Honor, I have one thing to say. His Honor's well aware that you are not allowed to attack anybody's credibility by a mere act of misconduct. That is not the way it is done. I object to it on that ground.

The Court: Well, on both objections, the court will sustain the same. We can't try out every other problem that may confront this defendant. He's charged with one crime only.

Q. (By Mr. Kirkland): Mr. Yokely, were you convicted of assault and battery here in Anchorage in 1954? [351]

A. Against Lena Mae?

Q. Well, assault and battery against anybody?

A. Against Lena Mae.

Q. Mr. Yokely, now when was the time that Lena Mae told you she was going down to see Pete Wetzel?

A. Oh, she didn't direct. She said she was going to see him. She brought out threats. She didn't make no specific time.

(Testimony of James Taylor Yokely.)

Q. Well, I didn't ask you the time—when she said the time. When did she make that threat to you?

A. Oh, I'd say three or four weeks previous to my arrest, I imagine.

Q. And you had seen her with Pete Wetzel along about that time, too?

A. Several times in bars. He sits up, buys them drinks, and everything—tries to get them to talk.

Q. And that is the reason you took this threat seriously and remembered it?

A. Beg pardon?

Q. And is that the reason you took this threat seriously?

A. I didn't take it seriously because I didn't pay any attention to it because I knew she had nothing to do with me. No harm. I merely had taken it for a conversation.

Q. Did they appear to be pretty good friends?

A. Who? Pete Wetzel and Lena Mae?

Q. Yes. [352]

A. I notice that every time he's down there at a bar, he make it his business to try to corner her off and buy her drinks and talk to her and try to get her to——

Q. And you saw them quite often. Is that not correct? A. Yes.

Q. Just before this occurred?

A. Not just before it occurred.

Q. Well, three weeks before, then?

A. Yes; around Anchorage about.

(Testimony of James Taylor Yokely.)

Q. Would it surprise you, Mr. Yokely, if I were to tell you Mr. Wetzel been transferred from Alaska a long time before this?

A. No; because I don't think so, unless my timing is a little wrong.

Mr. Kirkland: No further cross-examination.

The Court: Any redirect?

Mr. Buckalew: No further questions, your Honor.

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the witness stand.)

The Court: You may call your next witness.

Mr. Dunn: Mr. Albert Dungee, your Honor.

The Court: Let the record show this is the same Mr. Dungee who testified before the court on the matter, and before doing so, he was sworn under oath. You may come forward and take [353] the witness stand without being resworn.

ALBERT L. DUNGEE

called as a witness for and on behalf of the defendants and having previously been duly sworn, testifies as follows on:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Albert L. Dungee.

Q. Where do you work, Mr. Dungee?

(Testimony of Albert L. Dungee.)

A. Casa Del Rosa now.

Q. Do you know the defendant, Lena Mae Wilkins? A. I do.

Q. Did you see her the day that James Yokely was arrested and eventually brought into court on this charge? A. That morning.

Q. You did see her that morning? A. Yes.

Q. About what time was that?

A. Just right after we opened; between 9:00 and 10:00.

Q. Now, what was your occupation then?

A. Bartender and janitor—little of everything.

Q. At what place? A. H & M Barbecue.

Q. Please tell the court where you saw Lena Mae Wilkins at [354] approximately 9:00 to 10:00 o'clock on that morning, and any conversation that took place between you, and anything that you observed concerning her condition—her physical condition?

A. Well, that morning I was in the kitchen we had there where we make our barbecue. Why, she come in and she yelled at me for a drink and that time when I got to the back of the bar, why, I refused her. I was arguing with her. I refused her a drink. It looked like she was high so I went on back to doing my work and she kept arguing about the drinks and I just say, "I refuse." That is all and I never gave her no more.

Q. Why did you refuse her a drink?

(Testimony of Albert L. Dungee.)

A. Usually when she gets high she always gives me a hard time.

Q. Was she high then?

A. To my seeing her I know she was high at the time.

Q. Did you think she was too drunk for you to serve her a drink?

A. I refused her at that time. I did.

Q. Is that the reason you did? A. Right.

Q. Well, did she accept your refusal or did she insist upon getting a drink?

A. Well, at the time I just refused. I went on back to doing my work. I put a quarter in the juke box and started it to playing to keep from listening to her.

Q. What was she doing? [355]

A. Sitting at the bar.

Q. That doesn't make any noise; just sitting at the bar.

A. Talking, mumbling, raising hell with me.

Mr. Kirkland: I object to counsel leading the witness.

The Court: Well, objection is overruled. You may answer.

Q. (By Mr. Dunn): Did you see her go to the telephone?

A. She was sitting at the telephone right at the corner of the bar.

Q. Did you see her walk at any time?

A. No; she was sitting at the time I came from

(Testimony of Albert L. Dungee.)

the kitchen. She was already at the bar and was sitting down.

Q. Now, how long have you known the defendant Wilkins?

A. Off and on for the last—well, I came here in '51—since about '52.

Q. Have you seen her both drunk and sober?

A. Many times.

Q. Can you tell from observing her when she is drunk and when she is sober?

A. When she is not drinking she is a fine person, well educated. When she is drinking she is the opposite way.

Q. There is an obvious difference between her as an individual when she is drunk and when she is sober?

A. That is right. [356]

Q. How was her voice?

A. She talks quiet when she is not drinking. She is peaceful, good conversation, but when she is drinking she is cussing or making arguments all the time.

Q. Did you understand clearly what she said?

A. When she is drinking, why, you can understand her plain enough. You take those cuss words sometimes she gives you.

Q. On this particular morning and at the time that you observed Lena Mae Wilkins between approximately 9:00 and 10:00 o'clock, in your opinion was she responsible for her actions or not?

A. To my knowledge, she wasn't responsible.

Q. You wouldn't have trusted her?

(Testimony of Albert L. Dungee.)

A. No, sir.

Mr. Dunn: No further questions, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Kirkland:

Q. You are the same Mr. Dungee that testified earlier in these proceedings before the court and in the absence of the jury? A. Yes.

Q. And did you not testify at that time that Lena Mae Wilkins was not—not only that you refused to serve her on that [357] occasion, but that in the future she was barred out of the H & M because she was a stoolie?

A. That was after this happened.

Q. Didn't you testify to that here before the court? A. No; I did not.

Q. You didn't say she was refused service in there after that time because she was a stooley?

A. She was barred from the H & M after this trouble came up and Yokely was arrested.

Q. After Yokely was arrested she was barred from the H & M? A. That is right.

Q. And now you testified that she was staggering and everything, is that correct, when she was down at your establishment?

A. Just like I told her attorney, I didn't see her walk. I was in the kitchen when she came in.

Q. Then you didn't see her walk?

A. Right.

(Testimony of Albert L. Dungee.)

Q. Was she able to hold her head straight up or was it wobbling and everything?

A. She was leaning on the bar just mumbling, arguing for me to serve her.

Q. Did you see her dial the number to call the F.B.I. or the police?

A. She used the telephone twice and seemed like she didn't get no number at all or didn't get her party. [358]

Q. Did you dial the number for her?

A. No, sir.

Q. Well, then, she was sober enough to dial the telephone number, is that correct?

A. I guess lots of drunks can do that.

Q. Is Yokely a friend of yours?

A. Just an everyday friend.

Q. Did you discuss what your testimony was going to be with Mr. Yokely? A. I have not.

Q. Did you discuss it with his attorney?

A. Well, they called me and asked me about this; what I knew about that morning.

Q. I believe you testified that you were only convicted of some minor crime about 20 years ago, is that right? A. Once again in Los Angeles.

Q. That was about 20 years ago, wasn't it?

A. No; that was in '51, I think. '51 or '52.

Q. '51 or '52. What was that crime?

A. Reckless driving.

Q. And you have been convicted of no other crime?

(Testimony of Albert L. Dungee.)

A. That is all, outside of the one in Pennsylvania in 1929.

Q. That was the liquor violation? A. Yes.

Q. Are you still employed down at the [359] H & M? A. No; we are Casa Del Rosa now.

Mr. Kirkland: No further questions.

The Court: Any redirect?

Mr. Dunn: Yes, your Honor.

Redirect Examination

By Mr. Dunn:

Q. How many times did you see Lena Mae dial a number on the telephone, Mr. Dungee?

A. She used the telephone about 3 or 4 times.

Q. How many numbers did she get?

A. The first couple of times I was behind the bar she didn't get any party.

Q. She only got one party out of the 2 or 3 tries? A. Right.

Q. Now, you heard Mr. Kirkland ask you if you talked to me concerning your testimony?

A. Yes, sir.

Q. Did I in any way coach you concerning your testimony? A. No, sir; you just asked me——

Mr. Kirkland: I object.

The Court: Objection overruled. You asked the question and opened up the field. [360]

Mr. Kirkland: I certainly didn't want the court to think I was trying to cast any such inference. Every attorney talks to his witnesses.

(Testimony of Albert L. Dungee.)

Mr. Dunn: No further questions along that line.

The Court: Any recross?

Recross-Examination

By Mr. Kirkland:

Q. How close to Lena Mae and the telephone were you when she was dialing?

A. The bar is made in kind of an "L" shape——

Q. I mean, approximately how many feet?

A. 10 or 12.

Q. Then you don't know whether she got a busy signal or what?

A. No; she hung up.

Mr. Kirkland: No further questions.

A. There wasn't no conversation

Mr. Kirkland: But you don't know whether it was a busy signal or not?

A. No.

Mr. Kirkland: No further questions.

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the stand.) [361]

The Court: You may call your next witness.

Mr. Buckalew: Your Honor, the defense rests—the defense for James Taylor Yokely.

Mr. Dunn: The same is true for defendant Wilkins.

The Court: Very well. Is there any rebuttal testimony?

Mr. Kirkland: Yes, your Honor. I would like

to call Mr. Hartlieb, the United States Commissioner.

The Court: Very well.

Mr. Kirkland: Your Honor, while the bailiff is contacting that witness I would like to call Mr. Buckalew.

Mr. Buckalew: Your Honor, may I approach the bench?

The Court: You may.

(Whereupon, all counsel approach the bench and the following proceedings were had out of the hearing of the jury.)

Mr. Buckalew: Your Honor, I think Mr. Kirkland is going to call me and ask me whether or not I saw Lena Mae Wilkins in the Commissioner's office on the day that she was in there. He is going to ask me whether or not she was drunk. Now, I don't think it is fair to me. I represent one of the defendants and I am not going to lie up there under oath, but if I testify truthfully we might as well forget it.

Mr. Kirkland: Eye witness.

The Court: Well, here, Mr. Kirkland——

Mr. Buckalew: It is putting me in an unfair position. [362] I wanted to get out of this to begin with. I figured he was going to do this all along.

The Court: Mr. Buckalew, the court appointed you as also Mr. Dunn. I don't think it is absolutely material to your case, is it, Mr. Kirkland?

Mr. Buckalew: How can I argue it, your Honor? That is, the question of whether or not when I saw

the woman—I mean, I wouldn't even be able to argue the case.

Mr. Kirkland: Certainly he would be able to argue. When counsel calls him to testify in his behalf he wouldn't be calling himself. It would be the prosecution that argues.

Mr. Dunn: Your Honor, I have got something to say. I suggest Mr. Buckalew can and I suggest he does claim a privilege against testifying against his client—rather, against my client because there are any number of things that Mr. Buckalew knows have been revealed to him at a time when this defense was being prepared jointly and that includes testimony concerning what took place at the Commissioner's office and I don't think he can keep that confidential and testify as to any matter which he received in confidence, although he received the confidential communication subsequent to the incident in question.

The Court: I think, Mr. Kirkland, it would be highly improper in light of the circumstances.

Mr. Kirkland: Yes, sir. Very well.

(Whereupon, all counsel returned to [363] their respective tables and the following proceedings were had in the presence of the jury.)

The Court: The motion to call Mr. Buckalew by the Government is denied by the court.

Mr. Kirkland: Call Mr. Hartlieb, your Honor.

GORDON L. HARTLIEB

called as a witness for and on behalf of the Government, in rebuttal, and, having previously been duly sworn, testifies as follows on:

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir?

A. Gordon Hartlieb.

Q. You are the United States Commissioner here at Anchorage? A. Yes, sir.

Q. Mr. Hartlieb, on September 7, 1954, did the defendant, Lena Mae Wilkins, appear before you on that date? A. Yes, sir; she did.

Q. And did she sign a document in front of you—or swear to the truth of that document?

A. She swore to the truth of it.

Q. Then she didn't sign it in front of you, is that correct, sir?

A. No, sir; she did not sign it in front [364] of me.

Q. But she did swear to the truth of it?

A. She swore to the truth of it and she acknowledged it was her signature.

Q. Now, was the defendant, Lena Mae Wilkins, drunk? A. In my opinion, no.

Q. Do you let drunk people sign documents in front of you which you notarize?

A. Not if I know they are intoxicated; no, sir.

Q. Well, how did the defendant appear to you? Did she appear to be acting wild?

(Testimony of Gordon L. Hartlieb.)

A. No, sir; she appeared normal.

Mr. Kirkland: Your witness.

The Court: You may cross-examine.

Cross-Examination

By Mr. Dunn:

Q. You say it is the policy of your office, Mr. Hartlieb, not to allow a drunk person to sign a statement in your presence?

A. That is my policy, sir; not a policy of my office.

Q. And this statement was signed before you?

A. No, sir.

A. That is right. I beg your pardon. Well, then, if Lena Mae Wilkins had, in your opinion, been drunk at the time she [365] appeared before you, you would not have allowed her to have signed the statement before you, would you? A. No, sir.

Q. Now, would it make any difference to you as to whether or not a person signed the statement before you or whether or not they simply acknowledged their signature before you?

A. For what purpose, sir?

Q. Well, would you place any different criterion with respect to sobriety on whether or not a person was acknowledging a signature before you or whether or not a person——

Mr. Kirkland: Your Honor, I object to anything further along this line. Counsel hasn't laid the proper foundation.

The Court: I think the objection should be over-

(Testimony of Gordon L. Hartlieb.)

ruled for the reason this is cross-examination. There may be some technical reason for it, counselor, so the objection will be overruled.

Q. I will finish my question, Mr. Hartlieb. Would you use any different criterion with respect to sobriety in deciding whether or not you were going to allow a person to sign a statement before you or in deciding whether or not you were going to allow a person to acknowledge a signature before you?

A. I have the feeling that there is less reason—if she were signing it in front of me for the first time and she made the statement in front of me I would certainly be more [366] concerned about her sobriety at that time than I would if a statement was brought before me and she was sober, as at that time, I wouldn't be as apt to be concerned about her condition at the time she made the statement, just so long as she was in control of all her faculties at the time she acknowledged it and admitted the statement was all true and that it was her signature.

Q. Then do I understand your testimony to be that you merely assumed that she was sober when this statement was in fact signed?

A. I didn't assume anything, sir. I had no reason to assume anything. She appeared to me to be completely normal and I don't ask everyone that signs a statement in front of me, "Are you sober?"

Q. But this statement wasn't signed?

(Testimony of Gordon L. Hartlieb.)

A. Or acknowledges a statement in front of me. Excuse me.

Q. Were you relying upon the fact she——

Mr. Kirkland: Your Honor, I object to any further questions along this line on the ground it is immaterial.

The Court: Objection overruled. He may answer.

Q. Were you relying upon the fact that the defendant was accompanied by a number of law enforcement officials so as to remove from your own shoulders the burden of having to decide her state of sobriety when she signed the statement?

A. That wasn't even a consideration, Mr. Dunn. It is my [367] position that a state of inebriation is out of the ordinary for someone coming in and attesting to a sworn statement.

Q. Well, now, since this statement wasn't signed before you, did you examine the signature rather closely?

A. I asked her if it was her signature.

Q. Did you examine the signature rather closely?

A. What do you mean by examine it closely?

Q. Looking at it over an abnormal period of time? A. No, sir; I can't say that I did.

Q. Now, I ask you, Mr. Hartlieb, to examine that signature and state whether or not, in your present opinion, that is a normal signature or not?

Mr. Kirkland: Your Honor, I object to that—don't answer the question until the court hears the

(Testimony of Gordon L. Hartlieb.)

argument—on the ground it is completely irrelevant and has no bearing—there has been no foundation laid whatsoever for a question like that.

The Court: The objection will be sustained, but for the reason—how would this witness know or have any way of knowing it was made by a sober person or a person highly inebriated?

Mr. Dunn: Your Honor, this witness is testifying for the purpose of supporting the veracity of that statement.

The Court: No; I don't think he is, counselor. I take issue with you. He is testifying that the witness, Lena Mae Wilkins, came before him and acknowledged to him in his presence [368] that that was her signature, that was her statement.

Mr. Dunn: Your Honor, I feel that I have the unfortunate duty here of examining into whether or not on rather close examination Mr. Hartlieb should not have refused to have taken the oath of this witness.

The Court: Counselor, you have the right on cross-examination to go into the condition of the person making the statement at the time. The court has sustained your position in respect thereto for the reason stated, therefore, that should be unequivocal as to why I ruled that way. This witness would never know whether or not this statement was made while the affiant was sober or highly intoxicated. There is no indication in the record that he is familiar with this signature aside from the one time.

(Testimony of Gordon L. Hartlieb.)

Q. (By Mr. Dunn): At the bottom of this statement, Mr. Hartlieb, there is some writing in green ink and a signature in either black or blue ink—I think it is black. Will you tell me who put that writing on this statement?

A. In green ink, sir?

Q. Yes. A. I don't know, sir.

Q. The signature belongs to whom?

A. Myself.

Q. That is your signature? [369]

A. Yes, sir.

Q. Now, did you read the writing in the green ink before you signed that?

A. I don't remember.

Q. What does the writing in the green ink say?

A. "Subscribed and sworn before me this September 7, 1954, Gordon W. Hartlieb."

Q. You don't remember whether you read that before you signed it or not?

A. No, sir; I don't.

Q. Your signature appears immediately after it, does it not? A. Yes, sir.

Q. As a matter of fact it is true, is it not, that your signature is in the middle of the writing in the green ink?

A. Well, that depends on what you are going to call the middle and the beginning and the end.

Q. Isn't it true? A. If you mean——

Q. If the writing in green ink is both before and after your signature? A. Yes, sir.

Q. You have no reason to think that the writing

(Testimony of Gordon L. Hartlieb.)

in green ink might have been placed on there after you signed it?

A. No, sir. I just don't have an opinion on it. I don't remember having read it. [370]

Q. Might or might not have been?

A. Might or might not have been.

Mr. Dunn: No further questions.

The Court: Any redirect?

Mr. Kirkland: No redirect.

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: Call Mr. McLaughlin.

GEORGE M. McLAUGHLIN

called as a witness for and on behalf of the Government, in rebuttal, and, having previously been duly sworn, testifies as follows on:

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir?

A. It is George McLaughlin.

Q. And you are an attorney at law?

A. I am.

Q. And you are also the City Magistrate for the City of Anchorage? A. I am.

Q. Now, Mr. McLaughlin, on or about September 7, 1954, did the defendant, Lena Mae Wilkins,

(Testimony of George M. McLaughlin.)

come to your office in the company of Mr. Sachen of the F.B.I. and Mr. Pass, a City Detective? [371]

A. I can't answer that, sir, because I cannot identify the defendant as of that day.

Q. Now, Mr. McLaughlin, how many times has Mr. Sachen and Mr. Pass brought a Negro woman to your office for the purpose of signing a complaint or for any other purpose? A. Only once.

Q. And you do recall them bringing a Negro woman to your office on one occasion?

A. Yes; I distinctly remember it, sir.

Q. And there is no other occasion that they brought anyone to your office? A. Never.

Q. Now, do you know for what purpose they brought this person to your office?

A. My recollection is on that occasion, whatever the date might have been, that Detective Pass and Mr. Sachen of the F.B.I. came to my office with a Negro woman for the purposes of swearing out a complaint.

The Court: May I interrupt you, please? I don't believe you have identified the office of this witness.

Mr. Kirkland. He said he was the City Magistrate.

The Court: I stand corrected. I didn't recall it.

Q. Was the person in the company of Mr. Sachen and Mr. Pass intoxicated?

A. No. [372]

Q. Sober? A. She was sober.

Mr. Kirkland: Your witness.

The Court: You may cross-examine.

(Testimony of George M. McLaughlin.)

Cross-Examination

By Mr. Dunn:

Q. Was this the Negro woman, Mr. McLaughlin?

A. That I cannot say, Mr. Dunn.

Q. How long did you have her under observation?

A. Approximately, within my recollection, it was about 5 minutes that she was physically present in my office. That is approximate.

Q. Was she standing or sitting?

A. My recollection is she was sitting.

Q. She came in and sat down?

A. Yes. I cannot recall whether I offered her a chair, but my recollection is that she definitely was sitting.

Q. That she was sitting? A. Sitting, yes.

Q. Now, how far would she have had to have walked from the time she came into your office until she sat down in the chair in your office? [373]

A. It would be approximately 7 or 8 feet, that is when she would have first come within my sight.

Q. And approximately the same distance to leave?

A. Approximately the same distance to leave.

Q. And you can't remember what she looks like, but you can remember she was sober?

A. Yes.

Mr. Dunn: No further questions.

The Court: Any redirect?

Mr. Kirkland: Yes, your Honor.

(Testimony of George M. McLaughlin.)

Redirect Examination

By Mr. Kirkland:

Q. Now, Mr. McLaughlin, by your last answer you meant you couldn't describe the woman's facial features, is that correct? A. That is true.

Q. In other words, in your official capacity do you allow a drunk person to sign a complaint charging someone with a crime?

A. I never have. I have never permitted it. If there is a question in my mind I have requested that the chief witness or the complaining witness return when he or she was sober. I have always refused it as a matter of policy. I have never [374] permitted it.

Mr. Kirkland: Thank you, sir. No further questions.

The Court: Mr. McLaughlin, the court would like to know what time of day it was that Mr. Sachen and this colored woman——

A. My recollection, your Honor, is that it was in the afternoon.

The Court: In the afternoon?

A. Yes, sir, because the way I can recall it is that I met either Detective Pass or Mr. Sachen, one or the other or possibly both, and told me they would have a lady in the office that afternoon.

Mr. Dunn: Your Honor, I have another question, if I may.

The Court: Very well.

Mr. Dunn: Did this Negro woman sign a complaint?

(Testimony of George M. McLaughlin.)

A. I cannot recall and I didn't even attempt to refresh my recollection by looking at the court's records because I wanted to present the evidence to you the way I recalled it without refreshing my recollection.

Mr. Dunn: You don't know whether you allowed her to or not?

A. I can't recall. All I can recall is that either she or Detective Pass signed the complaint. That is the only thing I can recall.

Mr. Dunn: One or the other?

A. One or the other. [375]

Mr. Dunn: No further questions.

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: Your Honor, I would like to call Mr. Fitzgerald. I believe it is about time for a recess and I could get him down at the office then.

The Court: Very well. The court will stand in recess for 10 minutes.

(Whereupon, at 4:10 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had.)

The Court: Let the record show all the jurors are back and present in the box. You may call your next witness.

Mr. Kirkland: Mr. Fitzgerald.

JAMES M. FITZGERALD

called as a witness for and on behalf of the Government, in rebuttal, and, having previously been duly sworn, testifies as follows on:

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir.

A. My name is James M. Fitzgerald.

Q. Your occupation? [376]

A. I am Assistant United States Attorney.

Q. Third Division?

A. In this Division, yes.

Q. Mr. Fitzgerald, on September 7, 1954, was the defendant, Lena Mae Wilkins, in your office?

A. I don't recall the date, but she was in the office on 2 occasions. I remember on one occasion she came in to testify—or she came in concerning a statement about a Mr. Yokely.

Q. And you remember that occasion?

A. I remember that occasion, yes.

Q. And on that occasion did you take the defendant, Lena Mae Wilkins, before the United States Commissioner?

A. Yes; she went down to the Commissioner's office.

Q. Was the defendant, Lena Mae Wilkins, drunk or sober on that occasion?

A. She wasn't drunk to my knowledge. She gave no indication of drunkenness and I certainly had no—my impression is that she was sober. The fact

(Testimony of James M. Fitzgerald.)

she was drunk was not raised or the question of drunkenness was not raised until some time later, I believe.

Q. And she appeared perfectly normal to you on that occasion?

A. Well, I hadn't seen her on other occasions, but there was nothing exceptional about her appearance, nothing to indicate she was intoxicated. [377]

Mr. Kirkland: Thank you, sir. Your witness.

The Court: You may cross-examine.

Cross-Examination

By Mr. Dunn:

Q. Mr. Fitzgerald, when I cross-examined you before, did I ask you whether or not you had any conversation with Lena Mae Wilkins just prior to her appearance before the Grand Jury when the matter of James Yokely was presented to the Grand Jury? A. Yes; you did.

Mr. Kirkland: I object to it, your Honor, on the ground it is immaterial and request the answer be stricken.

The Court: What is the materiality of it, Mr. Dunn?

Mr. Dunn: I was trying to save time. I can lay the foundation for where he was at what time and who he was talking to and everything, if you wish, but I was simply trying to cut it short.

The Court: Counsel, I suppose we will have to follow the customary accepted rules and practice as there has been an objection made.

(Testimony of James M. Fitzgerald.)

Mr. Kirkland: Of course, my objection is based on a conversation at a later date. I am not objecting to the conversation [378] pertaining to the time the statement was given. It is what occurred after that.

The Court: Now, in that respect, that was not brought up on direct examination and, therefore, you cannot go beyond the scope of direct examination.

Mr. Dunn: So far as the scope of the testimony is concerned, your Honor, the question is preliminary to cross-examining the witness on the state of intoxication of Lena Mae Wilkins on the afternoon of September 7.

The Court: Well, if it is preliminary and you will assure the court you will connect it up, the objection will be overruled.

Mr. Dunn: Maybe I can approach it from another standpoint and which will be more to Mr. Kirkland's satisfaction, your Honor.

The Court: Very well.

Q. (By Mr. Dunn): Mr. Fitzgerald, did you have any conversation with Lena Mae Wilkins prior, immediately prior to her appearance before the Grand Jury in connection with the Grand Jury considering the indictment of James Yokely?

A. Yes; I did.

Mr. Kirkland: I object to that, your Honor, on the ground it is immaterial. Anything occurring after the signing of the statement could have no bearing on the issues to be decided [379] here.

(Testimony of James M. Fitzgerald.)

The Court: The court will have to sustain the objection at this time, Mr. Dunn.

Mr. Dunn: If the court would like I will approach the bench and tell the court what I am leading up to.

The Court: Well, maybe you had better do that because as it stands now the court would have to sustain the objection made by Mr. Kirkland.

(Thereupon, all counsel approached the bench and the following proceedings were had out of the hearing of the jury.)

Mr. Dunn: The same thing I asked him before, your Honor—I intend to ask him whether or not at that time he said to the defendant Wilkins that she was sober and he would swear to that fact and the purpose of eliciting testimony is to draw a comparison between the definiteness of his statement one time and the rather luke-warm statement he is currently making. It is his general observation. He doesn't recall anything abnormal. One time he made a specific statement and now his testimony is far weaker than it was.

The Court: What is your position, Mr. Kirkland?

Mr. Kirkland: It is absolutely immaterial and could have no bearing, couldn't show anything. I don't see where it would prove anything.

Mr. Dunn: Inconsistent statements of a witness is [380] material.

(Testimony of James M. Fitzgerald.)

The Court: That is the position the court takes. Do you maintain it is inconsistent?

Mr. Kirkland: No; I don't think it is inconsistent. As I remember it from the first time Mr. Fitzgerald said he advised her that when she said she was drunk that he would have to testify she was sober and that is just what he has done today.

The Court: In that case you shouldn't have any objection to the question being asked.

Mr. Kirkland: It is just immaterial. It is a self-serving declaration.

The Court: Well, in light of all the circumstances the court feels he will have to overrule the objection.

(Thereupon, all counsel returned to their respective tables and the following proceedings were had in the presence of the jury.)

The Court: Based upon the discussion at the bench the court overrules the objection. You may answer.

A. I did answer.

Q. (By Mr. Dunn): You answered, did you not, you did have a conversation?

A. Yes; I had a conversation.

Q. What did you say to her at that time concerning her state of sobriety?

A. Well, I explained it this way, Mr. Dunn, the only reason I [381] had her in my office was because I had heard of her past reputation——

Q. Excuse me one second. I am not trying to cut

(Testimony of James M. Fitzgerald.)

you off at all. Is this the second time you saw the defendant Wilkins?

A. No. The only reason she went to the Commissioner's office was because I wanted to get her statement under oath because I knew of her past reputation. The reason I am sure as to her sobriety was because I was going to authorize a white slavery charge against Mr. Yokely based upon the testimony of the defendant. When I went down to the Commissioner—or when she came in later, she said, "I don't want to testify against Mr. Yokely because I was drunk at that time, at the time I gave you the statement," and I told her at that time that as far as I was concerned I would have to swear, if I were called, that she was sober and I don't know if we had much more of a discussion or not.

Q. Now, then, at that time, just prior to the defendant Wilkins appearing before the Grand Jury, you told her then, did you not, that if you were called you would swear under oath she was sober when you saw her the day you took her to the Commissioner's office?

A. That is the general conversation I had with her, yes, sir.

Q. Do you now testify that to your knowledge she was not drunk? A. To what?

Q. Do you now testify that to your knowledge she was not drunk the day you took her to the Commissioner's office? [382]

A. To my knowledge she was not drunk, yes.

Q. That is your present testimony?

(Testimony of James M. Fitzgerald.)

A. That has always been my testimony.

Q. Is your present testimony also that it is your impression she was sober at that time?

A. It is my——

Q. Did you so testify on direct examination just a minute ago?

A. What I will say is this: That as far as being drunk on that date I don't know if she was and to the best of my knowledge she was sober.

Q. I just want to get this straight. Now, is this your present testimony—I am just trying to find out what it is—is your present testimony that on the day you took her to the Commissioner's office to your knowledge she was not drunk and that your impression is that she was sober?

A. That is essentially my position or my testimony.

Q. Have you seen her only twice?

A. No; I have seen her subsequently on several occasions.

Q. Up to the time you made the statement you would swear she was sober, you had seen her only twice?

A. To the best of my remembrance I think I had only seen her twice or at least I only recall seeing her twice, yes.

Mr. Dunn: No further questions.

The Court: Any redirect?

Mr. Kirkland: No redirect. [383]

The Court: That is all. You may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: I would like to call Mr. Sachen.

JOSEPH V. SACHEN

called as a witness for and on behalf of the Government, in rebuttal, and having previously been duly sworn, testifies as follows on:

Direct Examination

By Mr. Kirkland:

Q. Mr. Sachen, you witnessed the signature of Lena Mae Wilkins on Exhibit No. 1, which I now hand you? A. Yes, sir.

Q. When did you first see Lena Mae Wilkins on September 7, 1954?

A. Between 9:00 and 9:30 at the Anchorage Police Department.

Q. At the Anchorage Police Department?

A. That is right.

Q. Was the defendant Lena Mae Wilkins drunk?

A. To my knowledge she wasn't drunk.

Q. She had been drinking, hadn't she?

A. Yes, she had.

Q. In other words, you could smell liquor on her breath? A. That is true.

Q. What time of the morning was that? [384]

A. About 9:00 o'clock, sir.

Q. And you advised her she had the right to counsel and so forth? A. Yes, I did, sir.

(Testimony of Joseph V. Sachen.)

Q. And what time did you and the defendant go before the United States Commissioner?

A. Sometime after 1:00 o'clock, sir.

Q. Sometime after 1:00? A. Yes, sir.

Q. Was the defendant drunk at that time?

A. She wasn't drunk at that time or I didn't think she was drunk in the morning when I first talked to her.

Mr. Kirkland: Thank you, sir. No further questions.

The Court: You may cross-examine.

Mr. Dunn: Will you read his last answer back, please.

(Thereupon the reporter read the last answer above.)

Mr. Dunn: No questions, your Honor.

The Court: That is all then. You may step down.

Mr. Kirkland: I have one further question I would like to ask.

The Court: What is this on, direct or redirect?

Mr. Kirkland: One more question on redirect, your Honor. I should have asked it the first time, but it slipped my mind.

The Court: Very well. You may ask the question.

Q. (By Mr. Kirkland): Did you take the defendant Lena Mae Wilkins before the [385] City Magistrate on that same occasion? A. Yes.

Mr. Kirkland: Thank you, sir.

The Court: Now is there any recross?

(Testimony of Joseph V. Sachen.)

Mr. Dunn: No, your Honor.

Mr. Buckalew: No, your Honor.

The Court: Thank you. You may step down, Mr. Sachen.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: Your Honor, I only have one more witness and he is a witness who has witnessed the signature on this document. I contacted him and his wife had to go downtown and he is baby sitting. Could we continue the case and I will call him in the morning as my first witness.

The Court: Of course, the court wants to conclude this as soon as possible. Will there be any rebuttal, counsel?

Mr. Buckalew: I don't think so, your Honor.

The Court: Mr. Dunn?

Mr. Dunn: I think not, your Honor.

The Court: How long do you think it will take with this witness tomorrow morning?

Mr. Kirkland. Probably 5 minutes. He was along with Mr. Sachen. It is cumulative, however, we have instructions to the jury providing if one side has stronger evidence, why, they should produce it. I feel we should call the witness for [386] that reason.

Mr. Buckalew: I would like to finish the case now, your Honor, then we can get on with the arguments.

The Court: Well, it is now 4:30 and as I have

(Testimony of Joseph V. Sachen.)

pointed out to counsel so often the court reporter doesn't get paid overtime nor does the court personnel. I am sure the jurors would like to get this case over with, on the other hand, they don't get paid overtime so I wonder—if it will only take 5 minutes tomorrow morning, with that assurance I think it may not be too inequitable——

Mr. Buckalew: We have no objection to that, your Honor.

The Court: That being the case then, ladies and gentlemen of the jury, this case will be continued until tomorrow morning at the hour of 10:00 o'clock. Again I must instruct you not to discuss this case among yourselves nor permit others to discuss it with you.

(Thereupon, at 4:30 o'clock p.m., court was adjourned to the next morning, this case to be resumed at 10:00 o'clock a.m., December 29, 1954.) [387]

December 29, 1954

The Court: You may call the roll of the jury.

The Clerk: Trial jury is all present, your Honor.

The Court: You may call your next witness.

Mr. Kirkland: I would like to call Mr. Pass.

THEODORE E. PASS

called as a witness for and on behalf of the Government, in rebuttal, and being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Kirkland:

Q. State your name, please, sir?

A. Theodore E. Pass.

Q. And your occupation?

A. Detective, Anchorage Police Department.

Q. And were you employed as a detective with the Anchorage Police Department on September 7, 1954?

A. Yes, sir.

Q. Is that your signature as a witness on this document?

A. Yes, it is.

The Court: Now, you are referring, counselor, to Exhibit No. 1, for the record sake?

Mr. Kirkland: Exhibit No. 1, yes, sir.

Q. Now, Mr. Pass, did you contact the defendant Lena Mae Wilkins on that day?

A. Yes, sir, I did. [389]

Q. Did you call her or did she call you?

A. No, sir, she called Chief Miller and in turn Chief Miller instructed me to go down and pick her up.

Q. Was the defendant Lena Mae Wilkins drunk or sober at that time?

A. She wasn't drunk. She had been drinking, but she certainly wasn't drunk.

Q. Now, what time of the day was this?

(Testimony of Theodore E. Pass.)

A. It was approximately 8:30 when I picked her up in the morning.

Q. And did you later accompany the defendant to the United States Commissioner's office?

A. No, I went to the United States Attorney's office with her.

Q. And what time of the day was that?

A. That was in the afternoon between 1:00 and 1:30.

Q. Was the defendant drunk or sober at that time?

A. She appeared to be sober.

Q. Was she able to walk steady?

A. Oh, yes.

Q. Or did you observe?

A. Yes.

Q. And she did not appear to you to be drunk?

A. No, sir, she definitely wasn't drunk.

Mr. Kirkland: Your witness.

The Court: You may cross-examine. [390]

Cross-Examination

By Mr. Buckalew:

Q. Where was the defendant Lena Mae Wilkins when you went down to get her?

A. She was standing in front of the H & M Barbecue.

Q. Do they sell whiskey down there?

A. Yes, sir, they do.

Q. How was Lena Mae dressed?

A. As I recall she had on slacks and a jacket.

Q. She looked like she had been up all night?

(Testimony of Theodore E. Pass.)

A. She didn't give me the appearance of being up all night, because most of those people are up all night down there.

Q. Will you answer the question, did she look like she had been up all night?

A. Not to me, no.

Q. Did she look like she had had a good night's sleep?

A. Well, sir, I have never seen her after a good night's sleep, so I wouldn't know.

Q. Were her eyes bloodshot?

A. No, I didn't take particular notice of them. They didn't appear to be bloodshot, as I recall.

Q. Did you observe her walk?

A. I saw her when she walked to the car and when she got out of [391] the car.

Q. Did you smell liquor on her breath?

A. Yes, sir, in the morning.

Q. Pretty strong smell?

A. Well, the car was closed up and you could smell the whiskey readily.

Q. Was she in the back seat or front?

A. She was in the front seat.

Q. Was she sitting next to you?

A. Well, there was only the 2 of us in the front seat.

Q. You and Lena Mae? A. Yes.

Q. Did she call Chief Miller first?

A. That is right.

Q. And Chief Miller sent you down to see her?

A. Yes, sir.

(Testimony of Theodore E. Pass.)

Q. What did Lena Mae tell you when you first got down there?

A. As I recall she said she wanted to sign a complaint against Yokely. That was the first word.

Q. Now, what frame of mind was she in?

A. She appeared to be quite angry at Yokely.

Q. Did she appear to be so angry she was almost in a state of hysteria or fit? A. No, no.

Q. Did she want to get Yokely in jail as soon as possible? [392]

A. Well, I don't know how soon she wanted to get him in jail. She merely stated she wanted to sign a complaint against Yokely.

Q. When somebody signs a complaint against them, doesn't it naturally follow that the complaint——

Mr. Kirkland: I object to the question as calling for a conclusion.

The Court: Objection sustained. It calls for a conclusion.

Q. The complaint was eventually signed against Yokely? A. That is correct.

Q. Was he placed in the Federal Jail?

A. No, he was placed in the Federal Jail as a result from the complaint from the United States Attorney's office.

Q. When did you first contact Mr. Sachen?

A. It was approximately 9:05 a.m., in the morning of the 7th at the City Police Station.

Q. I see. Who notified the F.B.I.? You or——

A. I have no idea. He and Mr. Clark, also of

(Testimony of Theodore E. Pass.)

the F.B.I., were at the station shortly after I arrived.

Q. At the time you talked to Lena Mae how was her language? Was it vile?

A. In the morning?

Q. Uh-huh. A. No. [393]

Q. (By Mr. Dunn): Mr. Pass, do you know whether or not later that same day the defendant Wilkins took all of her clothes to the Police Station?

A. Her clothes were at the Police Station and how they got there I couldn't say. I was busy at the Federal Building.

Q. Somebody at least took her clothes to the Police Station that day?

A. At her wishes, yes.

Q. At her wishes?

A. That is the way I understand it.

Q. Did she later remove them from the Police Station?

A. They were removed. I don't know who removed them.

Q. Would that be something the Police Department would do to accommodate her?

A. Well, to accommodate all parties, as I see it, because there was quite a bit of confusion and hard feelings. She wanted to get out of there and she had no place to go immediately. She wanted her clothes out of there and so did Mr. Yokely so we took them out.

Q. That was just an accommodation. It wasn't an

(Testimony of Theodore E. Pass.)

inducement of the particular sort for this defendant?

A. No, I don't see how it would be inducement or favor. We often do that in family squabbles and different disturbances where one wants to move out. [394]

Q. She had never stored her clothes there before? A. Not to my knowledge.

Q. Now, didn't you just testify on cross-examination by Mr. Buckalew that you had never seen the defendant after she had had a good night's sleep?

A. Well, I wouldn't know whether she had had a good night's sleep. I am not that familiar with her.

Q. What I asked you is whether or not you, as you recall your testimony elicited by Mr. Buckalew, was it or was it not to the effect that you had never seen the defendant Wilkins after she had had a good night's sleep?

A. To that effect, yes, sir.

Q. Then on the morning of September 7, the defendant had not had a good night's sleep?

A. Well, she didn't appear to have been freshly arisen. You know how you look when you first get out of bed.

Q. She looked like she had been up for quite awhile?

A. Well, she looked like she had been up—I don't know for how long.

Q. I know she was up. Well, what was her overall appearance? Was it neat?

(Testimony of Theodore E. Pass.)

A. Yes, she appeared neat to me.

Q. Didn't appear to be disheveled at all?

A. No, no, I wouldn't say so.

Q. Did you go down to the East Chester Flats at the time [395] Mr. Yokely was arrested?

A. Yes, I did.

Q. Did you go inside the house?

A. Yes, I did.

Q. Did you go into the room of the defendant Wilkins? A. No. I don't recall.

Mr. Kirkland: I object to any further questions along that line. It is going beyond the scope of the direct examination. The defendant rested and now he is attempting to reopen his case on this matter.

Mr. Dunn: Your Honor, I am still asking preliminary questions as to the drunken condition of the defendant Wilkins on this particular morning.

The Court: Well, as I recall, Mr. Kirkland, on direct examination you asked this witness whether or not he went to the District Attorney's office between 1:00 and 1:30 or he testified as such.

Mr. Kirkland: That is right, your Honor, but at the time the statement was sworn to in the form in which it has been offered in evidence, after that it makes no difference and if counsel wants to ask those questions he has to assume the witness as his own.

The Court: I think that is right, Mr. Dunn. Therefore, the objection will have to be sustained.

Mr. Dunn: Your Honor, he has a chance for

(Testimony of Theodore E. Pass.)

redirect [396] examination. I don't mind him questioning the witness further.

The Court: No, that isn't the point, counselor. It is the question of evidentiary procedure and the question apparently has gone beyond the scope of direct examination, therefore, if you want to make him your witness you may do so.

Mr. Dunn: I am perfectly willing to adopt him.

The Court: Are you through with your cross-examination then?

Mr. Dunn: I have trouble distinguishing between the 2. I am not——

Q. (By Mr. Dunn): Now, you testified, did you not, that the defendant Wilkins seemed quite angry at the defendant Yokely?

A. In the morning when I first picked her up, that is correct.

Q. But that it did not reach the stage of hysteria or having a fit?

A. No, not to my estimation.

Q. Was she appreciably aggravated and upset?

A. She was angry. She was quite angry.

Q. Quite angry? A. Yes.

Q. Now, was Mr. Sachen present at this time?

A. When I picked her up?

Q. When she was quite angry?

A. She had simmered down considerably when we got to the [397] Police Station and all through obtaining the statement she was more her normal self.

(Testimony of Theodore E. Pass.)

Q. Then I take it it took her about 10 minutes to get settled down, is that correct?

A. No, I wouldn't say it took her ten minutes. By the time we had gotten to the station and she just got out of the car, walked back to my desk, had a seat and had a cigarette, she didn't seem to be quite as angry as she had been when she first contacted me.

Q. Did you see the defendant Wilkins at any time take a drink that day?

A. A drink of liquor, you mean, Mr. Dunn?

Q. Any intoxicating beverage?

A. No, I didn't.

Mr. Dunn: Your Honor, I think that completes my cross. Now, if this is in the nature of direct examination then I adopt the witness as my own.

The Court: Very well. You may do so.

Q. (By Mr. Dunn): Now, Mr. Pass, did you ever have occasion to enter or look into the room of the defendant Wilkins that morning?

A. I did not enter, but I do seem to recall looking into it as I went down the hallway towards the bathroom where Yokely was.

Q. Did you see anything unusual or out of the way there?

A. Not that I recall, no. [398]

Q. Did you see any clothes scattered all over the floor?

A. I don't recall seeing them, but I have a vague recollection of there might have been a pile of

(Testimony of Theodore E. Pass.)

clothing at the foot of the bed, but, as I say, I didn't go into the room.

Q. Did you see any liquor in that room?

A. I don't recall, no.

Mr. Dunn: No further questions.

The Court: Very well. Now, Mr. Kirkland, you may cross-examine.

Mr. Kirkland: No cross.

The Court: Now, do you have any redirect then, counselor?

Mr. Kirkland: No, your Honor, no redirect.

The Court: Do you have any cross on Mr. Dunn's adopting this witness, Mr. Buckalew?

Mr. Kirkland: I object to that. I don't think counsel should have any right of cross-examination.

The Court: Objection overruled, if he does.

Mr. Buckalew: I do not, your Honor.

The Court: Thank you. Very well. Then you may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Kirkland: Nothing further.

The Court: Is there any surrebuttal?

Mr. Dunn: Not on behalf of the defendant Wilkins. [399]

Mr. Buckalew: None on behalf of the defendant Yokely.

The Court: Very well. That being the case then both parties rest. The court will stand in recess for

ten minutes while counsel look over the instructions before proceeding with the arguments.

(Whereupon, at 10:25 o'clock a.m., following a 10-minute recess, court reconvenes in the Judge's Chambers with all counsel and the court reporter being present, and the following proceeding were had:)

The Court: At the request of Mr. Dunn, counsel for the defendant Wilkins, all counsel are present in the Judge's Chambers desiring to take exceptions, if any they have, to the instructions in the Chambers rather than at the bench for the reason that it makes it rather crowded when there are so many counsel before the bench and also the question of keeping it quiet enough in order that the jurors may not hear the exceptions, if any they take to the instructions. That being the case, at this time the court would ask, do you agree to this, Mr. Kirkland, Mr. Plummer?

Mr. Kirkland: Yes, your Honor.

Mr. Plummer: Yes, your Honor.

Mr. Buckalew: Yes, your Honor.

Mr. Dunn: Yes, your Honor.

The Court: Very well. At this time then the Government may take their exceptions, if any they have, to the instructions. [400]

Mr. Kirkland: No exceptions.

The Court: Very well. At this time then, Mr. Dunn, you may take your exceptions to the instructions, if any you have.

Mr. Dunn: Your Honor, Mr. Buckalew and I

have not had a chance to go over these together, so some of these I make will be in the nature of a suggestion to him. This is my own; on Page 5, either at the end of the second paragraph or at the end of the page I would request that the court add on language of this nature: "In deciding the lack of understanding on the part of the person making such a statement you may consider the degree of sobriety or drunkenness of the person making the statement." And then after the word "find"—

The Court: That is on Line 22?

Mr. Dunn: Line 32, your Honor, in the last paragraph. I would suggest that the court insert the words "beyond a reasonable doubt."

The Court: Well, let the exception be noted.

Mr. Dunn: On Page 9, your Honor, or else on Page 15 after Line 14, one of the two places, I think there should be inserted the rule of law that a statement that is false in part may be distrusted as to the whole. In other words, I think that the jury should be instructed that this business of falsity in part leads to distrust of the whole, and applies not only to the testimony of a witness, but also to a signed statement. [401]

The Court: Let the exception be noted.

Mr. Dunn: On Page 12, your Honor, I think that the instruction should continue, so as to inform the jury along the following lines—however, I make this as a suggestion to Mr. Buckalew. He may make the exception or not as he pleases—"If you find that the conspiracy was in fact terminated at the time the written statement of the defendant Wilkins

was given you are not to consider the written statement against the defendant Yokely.”

The Court: Let the exception be noted.

Mr. Dunn: Do you wish to make that exception, Mr. Buckalew? That is not mine. I suggested it to him.

The Court: In that respect I suggest you let Mr. Buckalew make his own exceptions and if you desire at this time, because of the informality of our presence here. You may go into a discussion off the record on it.

Mr. Buckalew: I would like to take an exception in the alternative. I will make my exception and then take Mr. Dunn’s exception as an alternative.

The Court: You are all through then, Mr. Dunn, is that correct?

Mr. Dunn: I am not sure, your Honor. One second, please. I am, your Honor.

The Court: Very well. Mr. Buckalew, you may take your exceptions, if any you have, at this [402] time.

Mr. Buckalew: I think Mr. Dunn covered them all except Instruction No. 12. I don’t believe there is any evidence that the conspiracy extended beyond the date in the indictment. From reading the indictment, and from the very nature of the crime it appears that it terminated on the expiration of the date set out in the second count of the indictment. For that reason I believe it is a preliminary question; something that the court should rule on.

and I believe the court is in error in leaving it up to the jury to decide whether or not the conspiracy has in fact terminated or still existing on September 7.

The Court: What position does that District Attorney's office take in respect thereto?

Mr. Kirkland: Your Honor, I apologize.

The Court: On No. 12. In other words, Mr. Buckalew states to the court that the conspiracy did not continue beyond the 13th day of April.

Mr. Kirkland: The Governments contends it is still continuing. In other words, if there is an attempt to conceal it to evade detection——

Mr. Dunn: On that point, your Honor——

Mr. Kirkland: I contend they are still trying to evade detection to the conspiracy, so it is up to the jury to decide.

Mr. Dunn: On that point, your Honor, I would like to submit there isn't any evidence. The District Attorney didn't even offer any evidence of a conspiracy continuing to the present [403] time and it is because of the fact that the court has indicated in the past that the continuation of conspiracy is a question for the jury that I think the jury should be instructed with respect to that particular point, they should decide whether or not that conspiracy is continuing, and base the consideration of that statement against Yokely on their determination as to whether or not the conspiracy continued.

Mr. Buckalew: John, I don't think there is any evidence in the record that the conspiracy is continuing.

Mr. Dunn: I don't think they tried to prove it.

Mr. Kirkland: Excuse me. If the court please, that is something to be drawn from inference and from facts and circumstances I submitted to the jury in this case. There is ample evidence, in my opinion, from which the jury can draw those inferences.

The Court: I point out to you in Instruction No. 12 the last sentence says, "the date of alleged conspiracy."

Mr. Buckalew: My position must be in error on the law then because the Government would always contend that the conspiracy was still in being, otherwise they would have the duty to run down and advise the Government of all the facts.

The Court: Well, in that respect the court does believe that your theory of the law is not in harmony with the weight of the law, therefore, let the exception be noted. Do you have any others, Mr. Buckalew?

Mr. Buckalew: That is all. [404]

The Court: Very well. That being the case then let's go back into court and commence with the arguments.

(Whereupon, at 10:46 o'clock a.m., court reconvenes in the main courtroom, and the following proceedings were had in the presence of the jury.)

The Court: Let the record show all the jurors are back and present in the box. Very well. Mr. Kirkland, you may proceed.

(Whereupon, following the closing arguments of counsel for the plaintiff and counsel for the defendants, the following proceedings were had.)

Mr. Yokely: I have something to say in my behalf.

The Court: You may approach the bench with your counsel only.

(Whereupon, all counsel approach the bench, and also the defendant Yokely, and the following proceedings were had out of hearing of the jury.)

Mr. Yokely: I want to bring out to the jury about what he brought up about the witness for—Alvin Placide and this Carl Samuels. These people do exist and I haven't had time to present them here and I don't have the money to send after these people like the Government does. If I did have time I would try to get them and give me a half way fair trial.

The Court: Well, here is the position the court has to take: You had counsel appointed to represent you. They presented the case and, frankly, I think very ably. [405]

Mr. Yokely: I understand that, but I didn't have time. I thought I would get the time to get these people here.

The Court: In that respect that is something I can't do anything about at this time. When the case was presented that could have been explained. It wasn't explained and at this time——

Mr. Yokely: I tried to explain it to you back in Chambers.

The Court: Yes, I realize that, however, I point out to you that you had ample time over the Christmas holidays to have gotten them here. The case was not concluded at that time.

Mr. Yokely: It takes money and time to locate them.

The Court: Well, the court feels, Mr. Yokely, that you have had a very fair trial. Let the jury decide whether you are guilty or not. The court doesn't decide that in light of the circumstances because of your representation and I think you can be proud of your representation.

Mr. Yokely: I am proud of that, but I still didn't have time to present my case properly.

Mr. Kirkland: Excuse me. Could I be heard at this point?

The Court: The court thinks the record is clear.

Mr. Kirkland: I would like to have this terminated—indirectly what he can't do directly.

The Court: Excepting this: That his concern is to have it before the jury. The court doesn't feel there is grounds to let it go before the jury, therefore, it is just a matter of [406] record. I will have to deny your motion, Mr. Yokely, for the reasons I have given before on that basis.

(Whereupon, all counsel return to their respective tables and the following proceedings were had in the presence of the jury.)

The Court: Counsel states that he wants to make

a motion to the court, but does not want to make it in the presence of the jury, that is counselor Buckalew. That being the case then counsel may come to the bench.

(Whereupon, all counsel approach the bench and the following proceedings were had out of the hearing of the jury.)

Mr. Dunn: Let the record show, your Honor, that I am making the same motion.

The Court: Very well.

Mr. Buckalew: I would like to move at this time that the court grant a mistrial on the ground that Mr. Kirkland in his argument commented indirectly to the fact that Lena Mae Wilkins did not take the stand in her own behalf.

Mr. Dunn: If your Honor please, he made that comment twice, indirectly both times. One was where he said something to the effect that the District Attorney did not have the power to produce these other witnesses.

The Court: Yes.

Mr. Dunn: And in the second place was that Yokely hitting the defendant was rather successful in preventing her from [407] testifying.

The Court: In that respect the motion will be denied on behalf of both defendants for the reason the instruction, which the court has caused to be prepared, which is part of the instructions, points out specifically that a defendant need not, under the laws of the Territory of Alaska, take the witness stand.

Mr. Buckalew: I would like to make one comment. I feel certain that it is such a grave error that it can't be cured by the instructions. I believe that is the law.

Mr. Dunn: I believe it is, too, your Honor.

The Court: Well, motion denied.

(Whereupon, all counsel returned to their respective tables, the Court read its written instructions to the jury, and thereafter the case was submitted to the jury to deliberate upon their verdict.) [408]

December 30, 1954

The Court: The jurors may please take their places in the box.

Mr. Dunn: If the court please, we would like to speak to the judge in Chambers before we proceed here and it seems to be just as well that the jury didn't take the box until we have.

The Court: Well, it won't take long, will it, counselor?

Mr. Dunn: No, it won't.

The Court: I wonder if the jurors couldn't take their places in the box in the meantime and the court will stand in recess until the call of the gavel.

(Whereupon, at 10:12 o'clock a.m., all counsel and the court reporter being present, court reconvened in the Judge's Chambers and the following proceedings were had.)

The Court: At the request of counsel for the de-

as to what has taken place and have the bailiff stay with them until such time as she is brought over to the jail for a couple of hours and report later on. [412]

Mr. Fitzgerald: Is it a sealed verdict?

The Court: Yes.

Mr. Groh: Hand the verdict in before that.

The Court: I don't know about that. I don't think so.

Mr. Groh: I suggest the verdict be handed in before we go in and tell the jury.

Mr. Dunn: I think so, your Honor.

The Court: How? She isn't here to even waive that.

Mr. Buckalew: It might be prejudicial to the Government, if they hear she is dead drunk and——

Mr. Plummer: As I understand it, the verdict has been sealed and has already been delivered to the Clerk of the Court.

The Court: No, I don't think so. The Foreman always has it.

Mr. Buckalew: What is to prevent one of the jurors from changing their mind?

Mr. Fitzgerald: The Foreman is required by law to keep it in his custody once it is sealed.

The Court: That is right. Suppose we poll the jury and one of the jurors has knowledge that Lena Mae is now dead drunk, it would substantiate your position she was drunk all the time, then when we go to poll the jury——

Mr. Dunn: That could work either way, your Honor, and I don't think the jury should be told

about this because it is not a matter of evidence that they have a right to consider in deciding the case. All admissible evidence is already in and I don't [413] think anything further in the way of information or whatever you want to call it should be given to that jury until that verdict is out of the custody of the jury.

The Court: Yes, but here is what I am worried about, Mr. Dunn, and that is this: Supposing now that the verdict is given to the Clerk of the Court. She wasn't here when that was stipulated to.

Mr. Groh: Your Honor, how about—maybe this could solve it—how about the possibility of instructing the foreman to keep it. In other words, keep the verdict in his possession. Leave it standing in status quo and not advise them except that something unavoidable has happened and after the proceedings is over, if they desire, you can tell them after the verdict is read.

The Court: I don't know. These people could never sit again. It is going to be a new page anyway, so let's assume there might be some grounds for a new trial, we can't influence or bias them. I haven't any objection to instructing the jury as to the obligations of the sealed verdict, but I feel that they likewise should be informed of her problem.

Mr. Groh: Your Honor, I think, as Mr. Dunn points out, there is some possibility it could affect their verdict either for or against the Government.

The Court: But the verdict is already completed.

Mr. Groh: Let's assume on the polling of the jury—

Mr. Buckalew: That is where it would come in. [414]

Mr. Groh: Let's assume it is a verdict of acquittal. Because the defendant didn't show up and because she is dead drunk at the time the jury came back, when they ask, "Is that your true and correct verdict," they could say, "No, I have changed my mind."

Mr. Dunn: You see, that is what I am very much concerned about.

The Court: You might have a point.

Mr. Groh: I don't think anybody would be prejudiced if we just said something unavoidable has happened.

Mr. Fitzgerald: Say something has happened. I wouldn't say unavoidable.

The Court: All right. Now, I do believe that we ought to have the defendant brought forthwith to some——

Mr. Groh: To the jail?

The Court: Yes, and I feel she should have been brought to the jail, Mr. Dunn—for the record here—this morning as soon as you found that out.

Mr. Dunn: I didn't find it out until I came over here for the verdict.

The Court: I see.

Mr. Buckalew: I didn't find out about it until I asked Yokely where Lena Mae was.

The Court: All right. Then in the meantime what do you think we should do concerning the jury and jury bailiffs? [415]

Mr. Dunn: Your Honor, I feel that if that ver-

dict remains in the hands of the jury that the jury should be kept from wandering around on the streets or they will find out about it.

The Court: That is the position I take.

Mr. Dunn: I think they should be asked to retire to the jury room.

Mr. Fitzgerald: Your Honor, if they are going to the jury room—if she is as drunk as that it might take quite a bit to sober her up and maybe we ought to have a doctor down here.

The Court: That is the next thing I was going to come to. Then the bailiff would have to serve them lunch also and then set it down for 1:30 or 2:00 o'clock to come back into court.

Mr. Dunn: I think a doctor can sober somebody up pretty fast with shots.

Mr. Groh: Yes, Dr. O'Malley explained it to us one time.

The Court: Let's go back to court on that basis.

(Whereupon, at 10:25 o'clock a.m., following the proceedings in the Judge's Chambers, court reconvenes, and the following proceedings were had:)

The Court: You may call the roll of the [416] jury.

The Clerk: Trial jury is all present, your Honor.

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

Foreman Asplund: Yes, we have, your Honor.

The Court: The court at this time instructs you, Mr. Asplund, as foreman of the jury, to retain that

verdict in your possession and not to let it get out of your possession, and the court at this time instructs the bailiffs of the jury to go with the jurors to retire to the jury room. Something has come up that requires your further service and the court will advise you as soon as possible as to what further disposition is to be made.

(Whereupon, the jury retired to the jury room to await being called and at 12:00 o'clock noon, with the jury being present, the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. The court has been advised by you, Mr. Asplund, that you have reached a verdict. Is that correct?

Foreman Asplund: That is correct.

The Court: You may hand it to the bailiff.

(Whereupon, the sealed verdict was handed to the bailiff and the bailiff handed it to the Court, and the Court handed the verdict to the Deputy Clerk with the instructions that the verdict be [417] read and filed.)

* * *

The Court: Is that your verdict, so say ye all?

(All jurors responded yes to the question.)

The Court: Do either of counsel want the jury polled?

Mr. Buckalew: Your Honor, on behalf of Mr. Yokely I would like the jury polled.

The Court: Very well. You may poll the jury.

(Thereupon, the jury is polled and each and every juror answers that the verdicts just read were his, and the jury is excused.) [419]

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true, full and correct transcript of the proceedings on the trial of the above-entitled cause, not including the examination of the jurors nor the closing arguments of counsel to the jury, taken by me in stenograph in open court at Anchorage, Alaska, on December 20, 21, 22, 23, 27, 28, 29, and 30, 1954, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed June 9, 1955.

[Title of District Court and Cause.]

Cr. 3122

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of

Appeals, Ninth Circuit, the provisions of Rule 75 (g) (o) of the Federal Rules of Civil Procedure, and the designation of counsel for Appellant, I am transmitting herewith the Original Papers and Exhibits in my office dealing with the above-entitled action or proceeding, together with the court reporter's transcript of all of the testimony taken at the trial of the cause.

The papers and exhibits transmitted herewith are described as follows:

1. Indictment.
2. Court's minutes of December 20, 1954, appointing counsel.
3. Defendant's proposed instruction No. 1.
4. Defendant's proposed instruction No. 2.
5. Defendant's proposed instruction No. 3.
6. Court's instruction to jury.
7. Verdict.
8. Motion for judgment of acquittal or new trial.
9. Order extending time to renew motion for acquittal or in the alternative for new trial.
10. Judgment, sentence and commitment.
11. Court's minutes of February 7, 1955, denying motion for new trial.
12. Notice of Appeal.
13. Appellant's designation of contents of original record.
14. Court's memorandum opinion dated March 8, 1955.

15. Order of Appellate Court dated March 28, 1955.

16. Order of Appellate Court dated May 6, 1955, extending time to docket record on appeal.

17. Reporter's transcript of testimony in 2 volumes.

18. Appellee's exhibits 1, 2, 3, 4, 5, 6, and 7.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled action by the above-entitled court on January 18, 1955, to the United States Court of Appeals at San Francisco, California.

Dated at Anchorage, Alaska, this 24th day of June, 1955.

[Seal] /s/ WM. A. HILTON,
Clerk of the United States District Court, Third
Division, Alaska.

[File of District Court and Cause.]

Cr. 3122

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that I am transmitting to the United States Court of Appeals for the Ninth Circuit Original Papers dealing with the above-entitled action or proceeding not included with the papers transmitted to said Court of Appeals with

my certificate dated June 24, 1955, which papers, among others, includes the court's minutes of December 1, 3 and 20, 1954, Setting Time for Arraignment, Arraignment and Setting Time for Plea, Plea of Not Guilty, and all proceedings pertaining to the trial. Said papers herewith transmitted to be and they are hereby consolidated with the original papers transmitted on the 24th day of June, 1954, as aforesaid.

Dated at Anchorage, Alaska, this 6th day of September, 1955.

[Seal] /s/ WM. A. HILTON,
Clerk, United States District Court, Third Judicial
Division, Alaska.

[Endorsed]: No. 14798. United States Court of Appeals for the Ninth Circuit. James Taylor Yokely, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed June 27, 1955.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14798

JAMES TAYLOR YOKELY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Appellant designates the following as points on which he intends to rely:

1. That the court erred in denying the defendant's motion for a mistrial at the close of all the evidence.

2. That the court erred in denying defendant's motion for judgment of acquittal and in the alternative a new trial.

3. That the verdict is contrary to the weight of the evidence.

4. That the verdict is not supported by substantial evidence.

5. That the court erred in giving instruction No. 12.

6. That the court erred in charging the jury and specifically in refusing to charge the jury as requested in defendant's proposed instruction No. 1.

7. That the defendant was substantially prejudiced and deprived of a fair trial by reason of the comment of the prosecuting attorney on the failure of the defendant Lena Mae Wilkins to take the stand.

8. That the court erred in admitting the government's exhibit No. 1.

DAVIS, RENFREW &
HUGHES.

By /s/ JOHN C. HUGHES.

Receipt of copy acknowledged.

[Endorsed]: Filed September 2, 1955.

No. 14,798

IN THE
United States Court of Appeals
For the Ninth Circuit

JAMES TAYLOR YOKELY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the District of Alaska,
Third Judicial Division.

BRIEF OF APPELLANT.

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Box 477, Anchorage, Alaska,

Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN, CLERK

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No. 14,798

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES TAYLOR YOKELY,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Appeal from the District Court for the District of Alaska,
Third Judicial Division.

BRIEF OF APPELLANT.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the District of Alaska, Third Division. The appellant was charged in the indictment with unlawfully and feloniously conspiring with Lena Mae Wilkins to violate the laws of the United States, to-wit: Section 2422, Title 18, USCA, namely, transporting within a possession of the United States a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery. The

indictment contains two counts. On the first count of the indictment three specific overt acts were set forth alleging that the defendants did or performed certain acts on or about the 19th day of April, 1954. The second count of the indictment alleged that the defendants did or performed two specific overt acts in furtherance of the objects of the conspiracy on or about the 13th day of April, 1954. (See Record 3, 4 and 5.)

The appellant entered a plea of not guilty (R 6) and after a trial by jury he was found guilty of both counts of the above described offense and thereafter, on the 18th day of January, 1955, the appellant was sentenced to imprisonment for the term and period of five years on each count, said sentence of count two to run concurrently with the sentence imposed on count one, and said sentence to commence on the 30th day of December, 1954. (R 35.)

Motion for judgment of acquittal and new trial (R 33) was filed on January 10, 1955, and was denied on the 7th day of February, 1955. (R 38.) Notice of appeal was filed on the 10th day of February, 1955. (R 38.)

The District Court had jurisdiction to try the case by virtue of the provisions of 53-1-1 and 53-2-1 Vol. 2 ACLA 1949.

This Court has jurisdiction of the appeal by virtue of the provisions of Sections 1291-1294 (2) new Title 28 United States Code.

II.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

1.

Facts and circumstances.

James Taylor Yokely became acquainted with Lena Mae Wilkins, the codefendant, on or about the 1st day of April, 1954, at which time both parties were in Anchorage, Alaska. James Taylor Yokely maintained a rooming house of sorts in which he also resided at 1806 East I Street, Anchorage, Alaska. The appellant and his wife separated in 1953 (R 360) and it appears that the appellant's wife was residing in Portland during the early spring months of 1954. According to the appellant's version of the situation, Lena Mae Wilkins resided at the dwelling or rooming house above mentioned, paying rent to James Taylor Yokely or William Kirby Yokely, who apparently rented the room to Lena Mae Wilkins in the absence of James Taylor Yokely. (R 316.)

Lena Mae Wilkins apparently had the run of the house in common with the other residents and upon occasion picked up the mail for the occupants of the Yokely house, or at least James Taylor Yokely's mail, which was addressed to General Delivery, Anchorage, Alaska. (R 346.)

On or about the 9th day of April, 1954, Lena Mae Wilkins journeyed from Anchorage to Fairbanks, Alaska, via Alaska Airlines, and there remained, according to the government's contention, for the purpose of prostitution, until on or about April 13, 1954. Thereafter she returned to Anchorage, remaining

over night at the Yokely residence, and thence went to Kodiak, Alaska, where she remained until on or about the 13th day of May, 1954, at which time she returned to Anchorage and took up residence in the Yokely house. She apparently remained in the Yokely residence until the 7th of September, 1954, when, in a state of anger (R 106) arising out of circumstances which are not crystal clear from the record, she made a statement implicating herself and James Taylor Yokely as co-conspirators, all as is set forth in the indictment at R 3 to 5, which closely parallels the factual circumstances as to travel therein recited. The statement made by Lena Mae Wilkins on the 7th of September, 1954, recited transactions in money and travel which were bolstered in some respects by evidence of the government.

No independent evidence was offered by the government in chief exclusive of Exhibit No. 1 (the September 7th statement of Lena Mae Wilkins R 167 et seq.) which in anywise tended to prove that Lena Mae Wilkins engaged in prostitution or intended to engage in prostitution or conspired with anybody else to do or perform any of said acts so alleged.

The last act consistent with the charge of conspiracy was alleged to have occurred on or about the 13th day of April, 1954.

One would be indeed naive if he did not concede from a reading of the record that Lena Mae Wilkins had at some time engaged in prostitution and that James Taylor Yokely was or had been, over the past several years, a man of leisure rather consistently

engaging in games of chance. It is not contended in this argument that the character of the appellant in this litigation was without blemish or that he had not at some time past had brushes with the law. However, as is frequently the case and as has been indicated by the court in practically every case reviewed, the past conduct of the defendants left something to be desired. In no case that the appellant has reviewed, was the character of the defendant as a moral risk considered by the court as germane to the issue except in a possible few cases where motive or intent was shown by such conduct, and then only as connected to the facts charged in the indictment.

As will be seen by the record, Lena Mae Wilkins, represented by counselor John Dunn, on trial, stood mute throughout the proceedings. The defendant James Taylor Yokely was represented by counselor Seaborn J. Buckalew, took the stand on his own behalf and generally denied any participation in an alleged conspiracy.

The statement of Lena Mae Wilkins made September 7, 1954, was admitted in evidence over the objection of defense counsel and is the main bone of contention so far as this appeal is concerned, for without that statement, the government had no case against James Taylor Yokely.

2.

Questions involved and how raised.

A. Whether or not there was sufficient evidence to justify a verdict of guilty.

This question was raised by a motion by counsel for the defense at the conclusion of the government's case for a dismissal of the indictment and by a motion for a new trial.

B. Questions raised on the admission or rejection of evidence.

These questions were raised by objections made at the time of the ruling of the trial court.

C. Questions raised by the instructions of the trial court and refusal of the trial court to give certain instructions requested by the defense.

III.

SPECIFICATIONS OF ERROR.

(a) That the court erred in denying defendant James Taylor Yokely's motion for a dismissal of the indictment, which was in effect a motion for a directed verdict, made at the close of the government's case. (R 310.)

(b) That the court erred in denying defendant's motion for a new trial. (R 33 through 39.) This question was raised by motion of counsel for the defendant (R 33) filed on the 10th day of January, 1955, and which was denied by the court on February 7, 1955. (R 38.)

(c) That the verdict is contrary to the weight of the evidence and is not supported by substantial evidence is a general issue and raised throughout the

trial by various motions of the defense aimed at the admission of government's exhibit No. 1, without which the government's case must of course fail. (R 310 et seq., R 408 et seq.)

(d) That the court erred in giving instruction No. 12 (R 22) and likewise erred in failing to give defendant's proposed instruction No. 1. This question was raised by objections and exceptions. (R 407.)

(e) That the defendant was substantially prejudiced and deprived of a fair trial by reason of the comment of the prosecuting attorney on the failure of Lena Mae Wilkins to take the stand. This question was raised upon motion of the defendant (R 33) but is not urged in this brief with particularity for the reason that the record was not extended to cover the argument of counsel and that the other considerations, in appellant's opinion, make it unnecessary to consider that particular error other than to call it to the attention of this Court as being before the Court on the occasion of the motion to fix bail pending appeal.

(f) That the court erred in admitting government's exhibit No. 1. This question was raised by appellant's counsel at R 70 and was urged with consistency throughout the trial on the basis that the conspiracy did not extend beyond the general time limits of the indictment.

IV.

ARGUMENT.**1. INSUFFICIENCY OF THE EVIDENCE
TO JUSTIFY THE VERDICT.**

That there was insufficient, substantial or proper evidence before the jury seems at first glance to require little argument. In order for the government to prove its case against the appellant, it must of a certainty prove beyond a reasonable doubt that the defendants first conspired to violate the laws of the United States of America as named and set forth in the indictment, counts 1 and 2, and that they later entered into acts pursuant to said conspiracy and that they did do some acts for the accomplishment thereof or attempted to do the same. The government in chief called seven witnesses. In order they were Sachen, Briggs, Baker, Dizney, Martin, Buckles and Johnson. None of these witnesses was able, by proper testimony, to establish that the defendants, or either of them, actually committed any immoral or illegal act. The testimony of Sachen dealt almost in its entirety with his activities on September 7, 1954, outlining in detail the methods and means of taking the statement from Lena Mae Wilkins, later introduced as government's exhibit No. 1. But outside of the statement itself, it can be conceded that Sachen had no personal knowledge nor obtained any positive knowledge in respect to which he gave testimony in regard to the offense charged against the appellant in the indictment.

Briggs (R 236), Baker (R 245), Dizney (R 262), Martin (R 291), Buckles (R 303) and Johnson (R

308) gave testimony of isolated, disconnected facts, none of which facts, standing alone, would constitute evidence of the commission of any crime, let alone proof of the crime charged in the indictment. Taking the combined substance of the government witnesses' testimony in chief, there was a complete lack of proof of competent evidence to sustain the conviction of the appellant, excluding, of course, government's exhibit No. 1.

What then did the combined testimony of the government's witnesses in chief accomplish? Appellant contends that the combined testimony of the government's witnesses in chief had the effect of setting the stage whereupon government's exhibit No. 1 was to lift itself by its own boot straps.

Mr. Kirkland, after reviewing briefly the language of the indictment in his opening statement to the jury, referred to a sworn statement of Lena Mae Wilkins that was to be introduced in evidence and after the court sustained the objection of Mr. Dunn to such comments before that evidence was admitted, Mr. Kirkland went on despite the ruling of the court and stated as follows:

“Very well. The Government will offer testimony from competent witnesses that this defendant, Lena Mae Wilkins, did everything that is alleged, along with the defendant, James Taylor Yokely, and the various other things which she made in a statement and there will be testimony to that effect. *And right down the line this statement will be corroborated as to the various*

details, even down to telegrams that were signed.”
(Emphasis added.) (R 62.)

Then and there the government disclosed a pattern of demeanor which was to be followed throughout the trial. Though no foundation was laid, the government did in fact obtain the admission of exhibit No. 1 over the objection of counsel, proceeding with testimony which could do no more than add stature to its own exhibit No. 1 and which did not show that the information contained in Exhibit No. 1 was true, or even proper, but attempted to show that it was possible. The same pattern of conduct was followed by the government in its obvious effort to blacken the character of the accused and before any shred of evidence was ever presented to the jury, indeed before any witness was ever called on behalf of the government, Mr. Kirkland labelled Lena Mae Wilkins as a prostitute, stating to the jury that defense counsel had stipulated to the fact that Lena Mae Wilkins was a prostitute. The rank prejudice visited upon the defendants is best shown by the language of Mr. Kirkland at R 62:

“I don’t think that it will now be necessary that I prove she is a prostitute. I believe counsel has stipulated to that fact, or at least has admitted it to the jury.”

Appellant contends that Mr. Kirkland’s statement was most unfair and improper by reason of the fact that nowhere in the indictment was Lena Mae Wilkins charged with being a prostitute and accordingly

the government was only doing indirectly what it could not do directly, namely, taking every opportunity to besmire the character of either or both of the defendants. The appellant challenges the government to show where in the record such a stipulation or admission to the jury was made as a foundation for Mr. Kirkland's statement.

While it occurred after the chief examination of the government, Mr. Kirkland was not content to besmire the character of the defendant James Taylor Yokely, but he had to inquire as to whether or not Yokely's wife was a prostitute (R 357) and Mr. Kirkland, not satisfied with proof of the indictment, at R 360 apparently wanted to establish that the appellant Yokely had evaded his income tax.

The government further, in calling its first witness, Mr. Sachen, after exactly 11 questions and in less than two full pages of testimony on the part of the FBI investigator and chief witness Joseph B. Sachen, in response to a question on behalf of the government, adduced the following testimony on behalf of the government at R 69:

“On the morning of September 7 when I appeared in my office there was a note for me stating that Lena Mae Wilkins was down at Honnicut's and wished to give me a statement regarding her being transported by James Yokely for the purpose of prostitution.”

As will be seen by R 69, Mr. Dunn objected to the witness' answer as hearsay and asked that the answer be stricken. The trial court sustained the objection

of Mr. Dunn after some argument at R 70 but never instructed the jury to disregard the hearsay statement of the witness Sachen above quoted.

The trial court at R 71 was ready to overrule Mr. Buckalew's objection that government's exhibit No. 1 was hearsay and inadmissible against the defendant Yokely, as will be seen by the court's statement. (R 71.) The court at that point was willing to rule in favor of the government but decided to hear argument on the matter and the only argument in favor of admission of government's exhibit No. 1 had been given by Mr. Kirkland as follows:

"The law would uphold the statement the defendant made would not be hearsay. Only the truth of those statements would be hearsay and is a matter for the jury to decide." (R 70.)

Whether this profound statement on the part of government's counsel had any effect upon the trial court is something which we will probably never know but hardly could Mr. Kirkland have made a statement that was more incorrect.

It was not enough the court allowed the unexpunged hearsay statement of the witness Sachen at R 69 to stand unstricken, but the trial court allowed improper arguments of law to be conducted on behalf of the government at R 72 and 73 after Mr. Buckalew had requested the court to excuse the jury at R 72.

At this point in its argument, the government, through Mr. Kirkland, was giving treatment to the case of *Simpson v. United States*, 289 Fed. (2d)

188. It is contended that if indeed the government understood the rule of law pronounced in *Simpson v. United States*, that certainly the same was never clearly stated in the record before the jury and prior to their being excused from exposure to arguments of law to the court at page 74 of the record. The court, by allowing such argument, submitted the jury to incorrect and prejudicial statements of counsel in respect to the law properly governing their consideration.

The quotation given by Mr. Kirkland at R 72, as lifted from the *Simpson* case, was indeed a partial, out-of-context quotation of the Ninth Circuit majority opinion and was taken from 16 Corpus Juris Criminal law at page 663, section 1320 and if indeed the government did not care to quote further from the Ninth Circuit opinion to determine what the court had in mind by citing 16 CJ 663, it might at least have read the following section in 16 CJ at 663, section 1321, which reads as follows:

“Where a party to a conspiracy abandons such conspiracy, his subsequent declarations with respect thereto are not in furtherance of its object, but are in the nature of admissions or confessions, and are not admissible against the other conspirators.”

There was much more to the *Simpson* case than was indicated by the government in its argument to the court on trial. It will be remembered from that case that there was no evidence whatsoever that on the

morning following the Sylph's capture that the alleged conspirators intended to abandon their efforts to bring their cargo of intoxicating beverages into Alaskan waters and indeed everything indicates in that case that had they been able to post the \$800.00 fine or bail, as the case may be, that they would have been allowed to remove the Sylph from Canadian waters and to pursue their unlawful adventure. This point was clearly brought out in the majority opinion of the court as a factor of great magnitude in its determination.

In the pages of the record from 68 to 84 the appellant has sought to determine the thinking of the trial court or the argument of the government upon which the trial court premised its decision to admit into evidence government's exhibit No. 1. It appears manifest to the appellant that the government's counsel did not advance convincing argument on the matter, for hardly could it be said that the government's argument was convincing when the government's statement of the law was inaccurate, or to say the very least, incomplete. Although the appellant has been unable to determine where in Mr. Kirkland's argument the theory was developed, it is interesting to note the position taken by the trial court at R 77, which reads as follows:

"The Court. Excepting this: Mr. Kirkland argues they may not make a statement after the conspiracy unless it reverts back to the acts done at the time of the conspiracy. I think that is the point you have overlooked. * * *"

Further quoting the Court:

“Of course, under what you state to the court it is obvious there is a difference as to the point of time. Then you haven’t argued the point, counselor. You haven’t met the argument, as I see it, that Mr. Kirkland has propounded. That is, the general premise of conspiracy cannot be brought into evidence if by chance it comes after, but it may be admitted if by chance it reverts back to the time that the acts were in fact committed and for which the defendants are charged.”

If appellant understands the trial court correctly, it did no more than state, unless the statement or testimony concerns some act involved in the alleged conspiracy it is not admissible, which of course is true, but is made true not because of the special rules as they apply to the statement or actions of alleged conspiracy but because testimony, in order to be admissible, must be relevant. Naturally a witness could not give testimony in respect to a matter not under consideration by the court for the simple reason that it would violate the rule of relevancy.

It is further contended that the argument of defense counsel at R 75 citing *United States v. Groves, et al.*, 122 Fed. (2d) 87, and to a lesser extent the *Ellis v. United States* case, cited at 138 Fed. (2d) 612 (it is to be noted that at record 75 the *Ellis* case is not shown to be cited in Fed. 2d), are proper authority for exactly the proposition that the defense was urging upon the court.

Appellant, in reading the trial court's discussion with counsel in the record, 68 through 84, is led to the inescapable conclusion that the trial court erred in sustaining the government's position without adopting as its own, argument of the government and upon grounds which lack the minimum blessing of candid definition. That defense counsel recognized the lack of clarity in this respect is disclosed at record 79 by Mr. Dunn when he addressed the court in the following language:

"May I take another crack at it?"

Further evidence that the government persistently attempted to blacken the character of the defendants by any means available, regardless of the admissibility or inadmissibility of the evidence, is shown at R 317 et seq. when Mr. Kirkland, in his cross examination of William Kirby Yokely, in regard to the Yokely residence, stated as follows:

"Q. Is that house a bawdy house?

A. No.

Q. Has anyone ever been arrested in that house charged with maintaining a bawdy house?

Mr. Dunn. Objection, your Honor. It couldn't possibly be a proper question. It is going again to my objection of being convicted of a crime. Counsel has some leeway and he is just broadening it.

The Court. In that respect the court was reading a note from the secretary. Would you please read the question back?

(Thereupon, the reporter read the question Line 6 above.)

Mr. Dunn. Let him ask the witness whether or not this witness has ever been arrested there. He can do that, I suppose, under the court's ruling, although I think it is an improper question, too.

Mr. Kirkland. I am not trying to attack this witness' integrity. Counsel brought out how he rented the room, etc., and I then wanted to go into detail surrounding the renting of this room. I then asked this witness if that house was a bawdy house and his answer was, no. I then asked him if anyone had been arrested out of that house and charged with maintaining a bawdy house at that particular address.

The Court. Objection overruled. You may answer."

Not only was the district attorney allowed to ask an improper, prejudicial, irrelevant question but the same was read back to the jury and Mr. Kirkland, in the quoted language above, again restated the substance of everything that had been asked by him in the first instance, re-read by the court reporter and accordingly the government's counsel three times placed before the jury prejudicial matter tending to show that the neighborhood or the dwelling in which the Yokelys lived was commonly known as a bawdy house.

Appellant has previously stated that the case in chief of the seven witnesses called by the government in discharging its burden of proof against the alleged conspirators, was by a recitation of disconnected, isolated instances which did nothing more than prove the possibility of the truth of government's exhibit No. 1.

The testimony of the witness Sachen, as appellant sees it, dealt almost entirely with the obtaining of government's exhibit No. 1.

Morris L. Briggs, at R 236, et seq., was the means for the introduction of proof that registered letter No. 1813 had been mailed by an unidentified person from Kodiak, Alaska, on April 19, 1954, as will be seen by the following response at R 243:

“Q. And who in fact mailed it. It is in fact unknown to you. Is that true?

A. That is correct. I personally do not know.

Q. As far as you know anybody in Kodiak could have mailed that letter?

A. I didn't see it mailed.”

The records of the Kodiak Postmaster became government's exhibit No. 2 and while they proved nothing so far as the indictment was concerned, it obviously was intended to support paragraph 10 of government's exhibit No. 1 found at the bottom of R 169.

Forbes D. Baker, of Alaska Airlines, called on behalf of the government, was the means through which the government introduced its exhibit No. 3, reflecting that a passenger by the name of Mickey Wilkins boarded flight No. 4 on the 14th day of April, 1954, and travelled from Fairbanks to Anchorage by virtue of ticket bearing form 272, No. 32269S. Forbes D. Baker further testified that he had seen Yokely and Miss Wilkins in Fairbanks in the summer of 1954. However he was unable to state under oath that he had seen the two defendants together on any particular occasion. He had been shown, by FBI agent

Woresham, during the course of investigation, pictures of the two defendants, at which time he had told the FBI agent at R 253:

“As I recall, I told the person who questioned me, that when I did see the picture, that I have seen the woman before, and I was quite sure she had traveled on our airline.”

This testimony obviously intended to make possible the government's proof of paragraph 9 of exhibit No. 1. (R 169.)

Through witness Clarence Dizney, the Deputy United States Marshal at Kodiak, Alaska, the government attempted, apparently to introduce evidence in respect to the defendant Miss Wilkins in regard to her reputation for *common fame* and over the objection of defense counsel to this type of testimony found at R 263, the court made this obfuscate statement:

“Reputation is limited to reputation; however, it is a case of prostitution. I do think that the question of character does come into consideration other than normally admitted. Ordinarily it's a question of reputation. Very well, you—objection is overruled. You may inquire.”

After much argument, objections and quite obvious confusion between R 263 and 272, we have the following instruction by the court:

“Well—but then, we must abide by the rules. Now, the court instructed you to ask that question, Mr. Kirkland, as outlined by the court.

Q. What was the defendant, Lena Mae Wilkins, general reputation for morality and decency in Kodiak, Alaska, at that time?

A. It did not comply with Territorial laws at that time.

Q. *Thank you, sir.* Did you go out to have a discussion with her?

A. Yes. From the information I did interrogate her about her work.

Q. Now, will you tell the court what took place at that discussion.

Mr. Buckalew. Your Honor, I am going to object to it on behalf of the defendant, Yokely, on the ground it's hearsay.

The Court. Objection overruled. You may answer. It's a question of conspiracy, Mr. Buckalew.

Mr. Buckalew. Sir?

The Court. It's a question of conspiracy; that is, the indictment. Therefore, as I pointed out this morning, in ruling of admissibility of that evidence, that that statement of one could conspire, or can bind the acts of another.

A. I did discuss with her the problem of her getting employment in Kodiak. At that time she stated she did not have any regular means of livelihood. I asked her if she intended to do so. She said, yes. And that in general was our conversation and my interrogation of her to find out where she was from, she said to me she was from Fairbanks. She had been in town a short time and a short time later, she left town."

Appellant contends that the testimony of the witness Clarence Dizney proved nothing to support the indictment as charged against either of the named defendants, and that the testimony of Clarence L. Dizney reflects opinion and hearsay which was im-

properly admitted. About all that the witness Dizney proved was that Miss Wilkins was in Kodiak on April 28, 1954 and left some time in May, the 10th, 11th or 12th.

About all that can be concluded from the testimony of the government's witness, Capt. Doyne K. Martin, of the Alaska Communications System, is that through him government's exhibits Nos. 4 and 5, generally consisting of telegrams and telegraphic money orders, were admitted, and that the telegrams were regular on their face. The witness further testified that it was the standard practice and rule of procedure of the Alaska Communications System that telegraphic money orders be received by a person who identifies himself as the proper recipient and that if a woman attempted to transmit funds by telegraphic money order in a man's name, this information would be noted on the application. In substance this testimony is given by the witness Capt. Martin at R 299. The net effect of Capt. Martin's testimony is to support or bolster paragraph 14 of government's exhibit No. 1. (R 170.)

Through the government's witness Gilbert R. Buckles, station manager of Pacific Northern Airlines, government's exhibit No. 6 was introduced, which, in effect, represented two segments of travel of one Mickey Wilkins; the first being a departure at 8:35 A.M. on the 15th day of April, 1954, flight No. 16, Anchorage to Kodiak; and the second being a segment of travel of Lena Mae Wilkins, May 12, 1954, at 5:45 P.M. Plane No. 465, ticket No. 311-

75810, Kodiak to Anchorage. (R 306.) This witness' testimony obviously was intended to bolster the statement of Miss Wilkins, government's exhibit No. 1, at paragraphs 9, 10, 11, 12 and 13, found at record 169 through 170.

The government's witness Olaf Johnson, Deputy United States Marshal, added nothing new to the testimony of any of the witnesses and was in substance that Lena Mae Wilkins resided in March of 1954 with Marvin Clark and that she was residing in the month of April, 1954 at 1806 East I, Yokely's house. (R 308.)

The government's case in chief concluded with the admission of exhibit No. 7 at record 309 over the objection of defense counsel, and while it is not clear from the record exactly what exhibit No. 7 showed on its face, it is obvious that ticket No. 11616 must have shown transportation of James Taylor Yokely from Anchorage to Fairbanks, or purported to show such transportation. The exact date of that exhibit is nowhere shown in the case in chief of the government. The appellant believes that the court erroneously allowed exhibit No. 7 to come in over the objection of defense counsel. (R 309.)

Appellant contends that counselor Buckalew at record 310 and 311 properly moved the court for a dismissal of the indictment and in plain and precise language urged the court for a direction as to James Taylor Yokely which should as a matter of course have been granted under the well established rule of *Logan v. United States*.

2. ERRORS IN THE ADMISSION OF EVIDENCE.

On the admission into evidence of government's exhibit No. 1.

Government's exhibit No. 1 consisted of a statement allegedly made voluntarily by Lena Mae Wilkins on the 7th day of September, 1954 and is found at R 167 through 171.

The record fully discloses the objections of the defendants to the admission of this evidence and the substance of Mr. Buckalew's exception on behalf of the appellant is stated at R 71 where he took the position that government's exhibit No. 1 was purely hearsay and stated as follows:

"If the conspiracy did exist it certainly had terminated on the 7th of September and it is my understanding of the law of conspiracy that there must be—for any statement made by Mrs. Wilkins to be admissible against Yokely it must have been made during the life of the conspiracy. This statement was made after the conspiracy terminated and it is clearly hearsay and inadmissible."

The court heard considerable argument of counsel wherein the government cited the Ninth Circuit Court of Appeals case of *Simpson v. United States* found at 289 Fed.(2d) page 188, and the defense cited *Ellis v. United States*, and *United States v. Groves, et al.* The substance of appellant's argument was that the alleged conspiracy had ended long prior to the date of September 7, 1954, and it is a simple matter of computation that four months and 25 days had expired

since any of the overt acts named or set forth in counts 1 and 2 of the indictment against the defendants. It will be recalled by the court that the indictment in the *Simpson* case was a general indictment setting forth a pattern of conduct without any particular time limitation whereby the conspirators were to have agreed or planned or conspired in the use of American licensed gas boats of at least ten tons burden, thence proceeding into foreign waters to secure cargo of intoxicating liquors and to return to ports in the Territory of Alaska. The court in the *Simpson* case first determined that the general allegations of the indictment were sufficient, and since the parties were charged with a general conspiracy it had a compelling effect upon the court in making the *Simpson* decision.

It is further to be noted that the argument of counsel during trial indicated that the parties did not fully understand the facts of the case. Nowhere was it indicated in the argument of counsel before the trial court that the alleged conspirators of the *Simpson* case were not in the custody of United States officials at the time the statement was made and this Court, in rendering the opinion, clearly indicated that the conspirators were not thwarted in their plan in any respect, since they were overhauled by a Canadian customs vessel, for the violation of Canadian navigation laws. It will be recalled in that case that there was no licensed skipper aboard, among other things.

Whether or not counsel properly explained the *Simpson* case to the trial court, or whether the trial

court used the *Simpson* case as a basis for its determination to admit government's exhibit No. 1 is moot. However, we do think it worthy of note that the *Simpson* case, decided in this court, was not without its dissent. In that case Judge Rudkin was of the firm conviction that the case should be decided on the basis of *Logan v. United States of America*, 144 U. S. 263, which laid to rest the question there presented. We do not now urge that the law as laid down in the *Simpson* case is erroneous as applied to the facts there presented, but we do urge that the *Simpson* case has no compelling force on the determination of the question here presented.

Now, as a general proposition it can be conceded that out-of-court statements such as we find in government's exhibit No. 1 are hearsay evidence and that their admissibility in a court of law, under certain circumstances, is an exception to the hearsay rule. It necessarily follows that when an exception is granted by our courts of law, to the well established hearsay rule of evidence, such exception would not be without its guards and conditions to protect such an exception from abuse. What then is the rule? Although it may be stated in a positive or a negative form, positively stated it is in substance as follows (emphasis added):

“Any act or declaration of one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy.”

Vol. 52 Michigan Law Review, June 1954. No. 8, page 1161.

There are accordingly three measures of admissibility, or three safeguards in the application of this exception to the hearsay rule: **furtherance**, **pendency** and **foundation**. Why, we might ask, do the decisions establish that the act or declaration, to be admissible, must be in the furtherance and during the pendency of the conspiracy? While it may not be clear from the decisions, it seems that it could be conceded that the sense of the court, whether based upon principal-agency or upon the theory of master and servant, honor among thieves or whatever other rationale may be applied in determining the rule, the courts have been well justified in reaching that conclusion, if for no other reason than on the basis of knowledge of the common affairs of men. It is a matter of common knowledge that statements are most apt to be blessed with candor and credibility when they are spontaneous and given without hope of reward, detriment of malice or fear of punishment. It is at least not uncommon that a discharged agent, a retiring dissatisfied partner or an aggrieved person in the ordinary intercourse of business relations might, after the conclusion of a sour business venture, make harsh, uncharitable and even untrue statements of a former associate. Those statements of course should not be given the same weight or credibility as statements made during the course of pleasant business affairs, because they may be super-induced by the natural human emotions and feelings experienced by all mankind. This is no less true in the case of the dissolution of a marriage; it is not infrequent, it is almost

the rule, that the statements of the complaining party to a marriage, made after the marriage has become shipwrecked, must be viewed with caution and oftentimes utterly disregarded.

These, or some of these elements, undoubtedly have influenced the court in establishing what the appellant contends is the controlling law of the case at bar. That law was well established in the case of *Logan v. United States*, 144 U. S. 263, decided in the Supreme Court of the United States on April 4, 1892, coming on error to the Circuit Court of the United States for the Northern District of Texas. Time will not be spent reviewing the facts of this case, which read like the script of a western thriller involving the waylaying and slaying of prisoners in custody of the law, shackled two by two in irons, and the successful escape of a part of those prisoners. Upon the trial of alleged co-conspirators there was evidence tending to show that Johnson, one of the alleged co-conspirators, while lying wounded at his home after the fight, at the solicitation of some of the defendants, for publication in a newspaper, gave a statement that Logan was one of the guards at Dry Creek on the night of January 19th. The defendants objected to the admission of this evidence, among other grounds, because the declarations were not made in Logan's presence, and were made after the crime had been committed and the conspirators had separated. The trial judge overruled the objection and admitted the evidence and the defendants excepted to its admission. The Supreme Court ordered a new trial on the grounds that

the admission of this incompetent evidence of such acts of Logan prejudiced all defendants and entitled them to a new trial. We quote then merely from the syllabus which is a clear and concise statement of the law established by that case and which has been cited as authority ever since.

“Upon an indictment for conspiracy, acts or declarations of one conspirator, made after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators.”

The statement from the syllabus of the *Logan* case might be what we would designate as a negative statement of the law as compared to what we have previously stated was positive, but in substance the same elements, safeguards or requirements stand as lamp posts to guide and light the path of the court in determining the admissibility of ex-parte, non-judicial statements made by one of the alleged co-conspirators.

It is not difficult to find cases in which the ex-parte, out-of-court statement, although made in closer proximity to the alleged overt acts, was disallowed by the court. Such a case is *U. S. v. Kovonsky*, 202 Fed. (2d) 721, decided March 9, 1953, CCA 7th, which followed the *Logan v. United States* case, as can be seen by the following language:

“To be admissible against others than declarant, a declaration must not only be made while conspiracy charged is pending but must also be in furtherance of object of conspiracy and by some one embraced within it.” (taken from the syllabus.)

It can be conceded that in the *Kovonsky* case, the party giving the ex-parte, out-of-court statement was not, by the evidence, well tied in to the alleged conspiracy and there was some doubt, as was expressed by the court, in determining that the maker of the statement was in fact a police officer and it can be further conceded that in that particular case that the court was troubled by the lack of another element arising out of the formula of safeguard, long established by the court, that is, foundation and independent proof.

So, too, was the court in *Montford, et al., v. United States*, cited at 200 Fed. (2d) 759, decided in the Fifth CCA December 29, 1952, confronted with lack of independent proof or foundation as can be seen by the following statement of the court in that case made:

“The declarations of one conspirator, made in furtherance of the objects of the conspiracy, and during its existence, are admissible against all members of the conspiracy.

The connection of a defendant with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of presence of defendant, and *there must be proof aliunde* of existence of the conspiracy and of defendant's connection with it, before such statements become admissible against defendant not present when they were made.” (emphasis added.)

In the *Montford* case there was no question but what the conspiracy, if such it was, was in existence

at the time of the alleged statements by reason of the fact that it was admitted that the various named defendants were participating in illicit barter and sale of intoxicating liquor at the time of the alleged statements and accordingly while the same point is not raised in the case at bar, the law of *Logan v. United States* remains controlling.

A case which more closely resembles the facts of the case at bar and which likewise follows the well established rule laid down in *Logan v. United States*, is the case of *Fiswick, et al. v. United States*, cited at 329 U.S. page 211, on certiorari, to the Circuit Court of Appeals for the Third Circuit, decided December 9, 1946. For a brief statement of the holding of the court we quote syllabus No. 1 thereof:

“Petitioners and others were indicted for conspiracy to defraud the United States in violation of section 37 of the Criminal Code. The indictment charged that petitioners conspired with each other, and with others, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. The last overt act alleged to have been committed by any of the petitioners was the filing by one of them of a registration statement under the Alien Registration Act of 1940, in which he falsely failed to disclose his connection with and activities in the Nazi party. Held that the conspiracy charged and proved did not extend beyond the date of the last overt act, and that admittance in evidence against all of the petitioners of admissions made after that date by one of the petitioners was reversible error.”

In that case the nature and the duration of the conspiracy was of great importance for the reason that each petitioner, after he was apprehended, made damaging statements to the federal agents. These statements were made during the course of the years of 1943 and 1944 and implicated all or a part of the other alleged co-conspirators. In the first instance each of these statements was admitted only against the maker but at the close of the government's case the District Court ruled that each of these statements was admissible against each of the other co-conspirators and so the jury was charged. The court in reviewing this action, noted that the last overt act charged in any of the indictments was the act of Mayer, one of the defendants, in his registration statement on December 23, 1940 and accordingly the Supreme Court held that all continuity of action ended with the last overt act of December of 1940. Mr. Justice Douglas, in delivering the opinion of the court, again cited with approval *Logan v. United States*, and in reversing the conviction of the Third Circuit Court of Appeals, took the position for the court that one could not say with fair assurance that in so instructing the jury and allowing the testimony to stand, that is, as to the out-of-court admissions, that the jury was not substantially swayed by the use of the admissions against all petitioners. The court further said that it was not enough to say that there may be a strong case made against each petitioner. The indictment charged the conspiracy and not the substantive crime of falsely registering. The evidence

that the petitioners conspired with each other was not at all strong. So it is in the case at bar.

Mr. Justice Douglas, in delivering the opinion of the court, quoted *Kotteakos v. United States*, 328 U.S. 750 as follows:

“If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from the constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so or if one is left in grave doubt, the conviction cannot stand.” *Kotteakos v. United States*, 328 U.S. 750, as cited in the *Fiswick* case.

While it was a civil case and may not be particularly in point, this Court did, in *Burnham Chemical v. Borax Consolidated, Ltd.*, 170 Fed. (2d) 569, decided CCA 9th, October 27, 1948, treat with the concept of an overt act. In that case the plaintiff in the trial court attempted to show that it had been damaged by actions of the defendant in violation of the anti-trust laws between the dates of May 17, 1929 and October 10, 1939, but had brought the suit much later than those dates and attempted to show an overt

act out of what court and counsel described as "the little placer" incident. It will be recalled that this court, with very slight modification, affirmed the judgment of the lower court. While this particular case may not have any moment or be of any aid in connection with the determination of the case at bar, it is called to the attention of the court merely by reason of the fact that the court there concluded, as appellant sees it, that an overt act in connection with any transaction must be a fundamental act, an act of some magnitude and import bearing a direct relation to the prime transaction or incident involved before the court for consideration. The "overt acts" in the case at bar lack this distinguished feature.

Appellant has, we think, established with certainty that the case at bar is not controlled by the rule of the *Simpson* case, which was apparently the bulwarks of the government's argument for admissibility of its exhibit No. 1, which case appellant contends the government improperly treated before the trial court. We point out again that the indictment in the *Simpson* case, as compared to the case at bar, is vastly different. The *Simpson* case sets forth an indictment in general language embracing a pattern of conduct which apparently could have extended over three years time, as allowed by the statute of limitations, whereas in the present case, in order for a conspiracy to have existed, the formula herein announced would of necessity require the trial court to apply the formula of pendency and furtherance to the language of counts 1 and 2 of the indictment, or some reasonable

interpretation thereof. Appellant maintains that the court erred and that such formula was not applied.

We have ample proof of the wisdom of the prior courts in establishing the safeguards when we consider the record before us, wherein it was admitted by the witness Sachen, chief witness for the government, in referring to the demeanor and the state of mind of Lena Mae Wilkins on the day that she gave the government's exhibit No. 1, as follows:

“I know she was angry. She seemed like she was angry with Yokely, yes.” (R 106.)

This is but one of the considerations that the courts have had in mind in establishing the safeguards to the exception in respect to the hearsay rule herein propounded by the appellant. That Lena Mae Wilkins and James Taylor Yokely may have indulged in sordid conduct or that Lena Mae Wilkins may have had reason to be angry with Yokely, or that they may have committed some breaches of substantive law, is not for us here, nor was it for the trial court, to consider. It was only the consideration of whether or not the defendants were guilty of the conspiracy charged and whether that offense charged could be proved by competent evidence.

We borrow from the language of Mr. Justice Jackson in his dissenting opinion of *Lutwak v. United States*, 344 U.S. 617, which stated in part as follows:

“Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effect to bridge the gap is apt to produce bad law.”

Assuming for the sake of argument that the trial court could have possibly admitted the statement contained in government's exhibit No. 1 as against the maker Lena Mae Wilkins, would it be possible to erase the damaging effect thereof as against the appellant by instructions, and if so, did the court's instructions accomplish that purpose? Appellant thinks not. The instructions of the court which could be most favorably viewed by the government to correct the manifest error of allowing government's exhibit No. 1 to be considered by the jury, on their deliberation as to the guilt or innocence of the accused as charged in the indictment, counts 1 and 2, are found in instructions Nos. 5, 9 and 12 at R 17, 20 and 22 respectively. The court's instruction No. 12, R 22, reads as follows:

“In this case, two defendants have been jointly indicted for the alleged crime of conspiracy. You are instructed that no acts or admissions of either of the defendants done or made out of the presence of the other after the termination of the alleged conspiracy, may be considered by you in determining the guilt or innocence of the other. It is for you to decide from all of the evidence the date of the termination of the alleged conspiracy.”

3. THE COURT ERRED IN GIVING INSTRUCTION NO. 12 AND IN FAILING TO GIVE APPELLANT'S PROPOSED INSTRUCTION NO. 1.

Appellant contends that instruction No. 12 was erroneously given in that it is premised upon an assumption of facts inconsistent with the proof. The court there in effect says that there is great doubt in

its mind after hearing all of the evidence as to whether or not the alleged conspiracy was in existence at the time of the making of the September 7th statement by Lena Mae Wilkins; that there should be any dispute of the fact, or that the court should have been troubled in regard to that fact, is negatived by the record, for it is almost inconceivable, as appellant believes, that the court could have been in doubt or should have been in doubt, after hearing some 75 pages of recorded testimony, that is R 89 to 165, out of the presence of the jury, dealing with the circumstances of the making of government's exhibit No. 1. The court, as appellant believes, in overruling objection of Mr. Buckalew, made an erroneous statement of the law which, in appellant's mind, contradicts the effect of instruction No. 12. The language of the court at R 273 is as follows:

“The Court. It's a question of conspiracy; that is, the indictment. Therefore, as I pointed out this morning, in ruling of admissibility of that evidence, that that statement of one could conspire, or can bind the acts of another.”

It seems obvious that the court reporter may not have properly understood the court's statement, which could and most likely was understood by the jury to mean that since the indictment charged conspiracy, the statement of one of the conspirators could be considered as evidence against the other without restriction.

The language above quoted, if appellant has interpreted the record correctly, undoubtedly conveyed

the impression to the jury early in the trial and long before instructions were given, that any act or declaration of one alleged conspirator could be used and was proper evidence against the other. This of course is not the law, and utterly disregards the safeguards established by the decisions of the courts in promulgating the exception to the hearsay rule of evidence generally applicable in trials involving conspiracy.

It is obvious that defendant's requested instruction No. 1 properly recites the law as established in the *Logan* case and it is to be noted that the authority of the *Logan* case was affixed to the requested instruction. That instruction or the substance thereof should have been given. The trial court's refusal to do so was error.

CONCLUSION.

Appellant contends that the record is clear and unmistakable that the statement of Lena Mae Wilkins, made four months and 25 days after the termination of any alleged conspiracy, was clearly not within the exception to the hearsay rule of evidence permissible in conspiracy cases, and that the allowance in evidence of government's exhibit No. 1 was error and without which the government had no case against the appellant, and that no amount of instructions, however carefully couched in wisely chosen language, could remove from the minds of the jury the dam-

aging effect thereof so far as the appellant Yokely was concerned.

The judgment of the lower court should be reversed.

Dated, Anchorage, Alaska,

January 27, 1956.

Respectfully submitted,

DAVIS, RENFREW & HUGHES,

By JOHN C. HUGHES,

Attorneys for Appellant.

No. 14800

United States
Court of Appeals
for the Ninth Circuit

FRANCES P. SYRACUSE and NEW WONDER
BAG CORPORATION,

Appellants,

vs.

HARRY PARIS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

OCT 20 1955

PAUL P. O'BRIEN, Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court Southern
District of California, Central Division

No. 15994—T

FRANCES P. SYRACUSE and NEW WONDER
BAG CORP.,

Plaintiffs,

vs.

HARRY PARIS, DOE I, DOE II, DOE III, DOE
IV,

Defendants.

COMPLAINT FOR PATENT
INFRINGEMENT

Comes Now the Plaintiffs and for their cause
of action against the defendants and each of them
alleges:

I.

This cause of action arises out of the patent laws
of the United States of America, U. S. C. Title 35
as amended, as hereinafter more fully appears.

II.

On December 12, 1950, U. S. Letters Patent No.
2,533,850 were duly and legally issued to plaintiff,
Frances P. Syracuse, for an invention in "Utility
Handbags Having Double Compartments with In-
dividual Closures and Independently Accessive
Bottle Pockets," and since that date plaintiff,
Frances P. Syracuse, has been the owner of said

U. S. Letters Patent No. 2,533,850 up to the date of January 5, 1951, when said patent was assigned [2*] to plaintiff, New Wonder Bag Corp., which corporation is still the owner of said patent.

III.

Defendants have been and still are wilfully, deliberately and intentionally infringing said Letters Patent by making, using and selling utility handbags embodying the patented invention, and will continue to do so unless enjoined by this court.

IV.

Plaintiffs have given written notice to the defendants of their said infringement, and have duly complied with the statutes respecting patent notice.

V.

The true names and/or capacities of the defendants, Doe I, Doe II, Doe III, and Doe IV, are unknown to the plaintiffs, who therefore sue said defendants by such fictitious names, and ask leave to amend to show their true names and/or capacities, whether individual, corporate, or otherwise, when the same have been ascertained.

Wherefore, plaintiffs demand a preliminary and final injunction against further infringement by defendants and those controlled by defendants, an assessment of costs and attorneys' fees against the defendants and an accounting for profits and damages, and that said profits and damages be tripled on ac-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

count of the deliberate, wilful and intentional nature of the defendants' infringement.

HAROLD SHIRE and
ROBERT E. GEAUQUE,

By /s/ ROBERT E. GEAUQUE,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 29, 1953. [3]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant Harry Paris, herein-after called said defendant, and answering for himself alone, admits denies and alleges as follows:

I.

Answering paragraph II of the Complaint filed herein, said defendant admits that on or about December 12, 1950, U.S. Letters Patent No. 2,533,850 were issued to plaintiff, Frances P. Syracuse, on a "Utility Handbag Having Double Compartment [5] with Individual Closures and Independently Accessible Bottle Pockets," but denies that such patent was duly or legally issued, and denies that said Handbag involves invention. As to the truth of the remaining averments of paragraph II of said Complaint, said defendant is without knowledge or information sufficient to form a belief.

II.

Answering paragraph III of said Complaint, said defendant denies generally and specifically each and every allegation therein contained.

III.

Answering paragraph IV of said Complaint, said defendant denies that he received from plaintiffs a written notice of defendant's alleged infringement, but as to the other averments of said paragraph IV, said defendant is without knowledge or information sufficient to form a belief.

Further Answering Said Complaint, and for Separate, Alternate and Further Defenses, the Said Defendant Alleges and Denies as Follows:

IV.

Denies that the device shown, described and claimed in the Letters Patent in suit, embodies any material or patentable advance over what was previously known to others skilled in the art, but on the contrary alleges that the claim of said patent is invalid and void because the alleged improvements described and claimed therein, and all material and substantial parts thereof, have been, prior to the date of the alleged invention or discovery thereof by the plaintiff Syracuse, [6] described, published, patented or claimed in the following U. S. Letters Patent:

Johnston 312,355—Feb. 17, 1885

Izett 1,136,138—Apr. 20, 1915

Nover	1,235,049—July 31, 1917
Penny	1,352,372—Dec. 16, 1919
Diamond	1,397,369—Nov. 15, 1921
Sommer	Des. 61,668—Nov. 14, 1922
Gale	1,617,629—Feb. 15, 1927
Zichy	1,653,246—Dec. 20, 1927
Struble	1,902,313—Mar. 21, 1933
Halpin	2,025,101—Dec. 24, 1935
Wehner	2,029,686—Feb. 4, 1936
Lyndes, et al.	2,274,718—Mar. 3, 1942
Broudy	2,369,943—Feb. 20, 1945
Salem	2,394,332—Feb. 5, 1946
Vasquez	2,429,856—Oct. 28, 1947
Holland	2,447,940—Aug. 24, 1948

V.

Alleges that the patent in suit is void and of no effect in law, in that devices containing the alleged improvements were invented by, known, on sale, and in public use in the United States before the conception of, and before the reduction to practice by the plaintiff Syracuse of the purported invention of the patent in suit, by the above-named patentees and by the parties listed hereinafter, whose places of invention, knowledge, sales and public use are respectively the residences of the patentees given in the above patents and the places listed after the respective names in the following list; and that said alleged improvements were invented by, known, on sale and in public use in the United States for more [7] than one (1) year prior to the application

for the patent in suit, by the patentees listed hereinbefore and by the parties listed hereinafter, whose places of invention, knowledge, sale and public use are respectively the residences given in the foregoing listed patents and the places listed after the following names respectively:

Harry Paris,
Los Angeles, California;
Sears, Roebuck & Co.,
Los Angeles, California;
Consolidated Bag Co.,
Los Angeles, California;
California Cobblers,
Los Angeles, California.

VI.

Alleges that while the application for the patent in suit was pending in the United States Patent Office, the plaintiff Syracuse, through her attorney, so limited and confined the claim of the patent in suit, under the requirements of the Commissioner of Patents, that the plaintiffs herein cannot now seek or obtain interpretation of said claim sufficiently broad to cover any device made, used, or sold by the said defendant Paris.

VII.

Alleges that the art in connection with the device shown in said Letters Patent in suit was crowded prior to the alleged invention or discovery

thereof by plaintiff Syracuse; and that the conception of the alleged invention or discovery required no invention whatever, but only ordinary mechanical skill, and that as a consequence the claim in suit fails to embody or [8] disclose any patentable invention which was not already common knowledge in the art, and that such claim, therefore, is void for lack of invention.

VIII.

Alleges that the claim in suit does not cover any valid or patentable combination, but embraces a mere aggregation of elements which have no definite and proper combination or co-operation, and that, therefore, the claim in suit fails to cover patentable subject matter and is, therefore, void.

IX.

Alleges that the patent in suit has been generally disregarded and ignored by the public and that the plaintiffs, well knowing of these actions by the public, have acquiesced in the general disregard of such patent; and that the said defendant has relied upon such acquiescence by the plaintiffs, whereby the plaintiffs are estopped from enforcing any alleged claim of infringement against said defendant.

X.

Alleges that the claim in suit is ambiguous, indefinite and uncertain, and does not particularly point out the part, improvement or combination which the plaintiff Syracuse claimed as her alleged

invention, as required by the Patent Statutes of the United States.

Wherefore, said defendant Harry Paris prays that plaintiffs' Complaint be dismissed; that Judgment be entered in favor of said defendant; that said defendant be awarded his costs of suit herein; and for such other and further relief [9] as to the Court seems just and equitable.

WARNER, PERACCA &
COWAN,

C. G. STRATTON,

By /s/ C. G. STRATTON,
Attorneys for Defendant
Harry Paris.

[Endorsed]: Filed April 1, 1954. [10]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Defendant Harry Paris moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a Summary Judgment in said defendant's favor, dismissing the action on the ground that United States Letters Patent in suit, No. 2,533,850, and the only claim thereof, are invalid.

The grounds for this Motion are:

(1) The combination claimed by the patent in suit is clearly anticipated by prior patent art which

was not cited or considered by the Commissioner of Patents while the application [11] for the patent in suit was pending and being prosecuted before the United States Patent Office;

(2) The combination claimed by the patent in suit is devoid of patentable novelty;

(3) There does not exist any genuine issue as to material facts necessary to consideration and determination of this Motion, since invalidity of the patent in suit is clearly apparent from a comparison of said patent in suit with said prior patents which were not considered by the Patent Office, but which are before the Court in this Motion.

In support of this Motion, the defendant Harry Paris will rely upon Rule 56 of the Federal Rules of Civil Procedure, the Affidavit and exhibits filed therewith, the deposition of the plaintiff Syracuse, and upon the annexed Brief in Support of Motion for Summary Judgment.

Dated at Los Angeles, California, this 2nd day of September, 1954.

WARNER, PRACCA & COWAN,
HENRY N. COWAN,
C. G. STRATTON,

By /s/ C. G. STRATTON,
Attorneys for Defendant
Harry Paris. [12]

[Title of District Court and Cause.]

AFFIDAVIT OF C. G. STRATTON

State of California,
County of Los Angeles—ss.

C. G. Stratton, being first duly sworn, deposes and says:

I am of counsel for Harry Paris, defendant herein, and as such counsel prepared and am familiar with the Motion for Summary Judgment herein.

I have obtained from the United States Patent Office, and file herewith as Exhibit "A," a true, certified, copy of [13] the United States Patent Office file wrapper of the United States Letters Patent in suit, No. 2,533,850, which is the patent in suit. The following patents, copies of which are filed herewith as Exhibit "B," were cited by the Examiner during the prosecution of the patent in suit through the Patent Office:

Number, Patentee and Date.

1,136,138	.....Izett—Apr. 20, 1915
1,325,372	.....Penny—Dec. 16, 1919
1,653,246	.....Zichy—Dec. 20, 1927
1,902,313	.....Struble—Mar. 21, 1933
2,029,686	.....Wehner—Feb. 4, 1936
2,274,718	.....Lyndes, et al.—Mar. 3, 1942
2,447,940	.....Holland—Aug. 24, 1948

I have also caused an independent search to be made of the prior patent art relating to the subject

matter of said patent in suit, in the United States Patent Office, and as a result of said search found the following prior patents, copies of which are filed herewith as Exhibit "C," which were not cited by the United States Patent Office against the application for said Letters Patent in suit:

Number, Patentee and Date.

147,477 (Des.)	.....Shanzer—Sept. 9, 1947
312,355	.....Johnston—Feb. 17, 1885
1,235,049	.....Nover—July 31, 1917
1,397,369	.....Diamond—Nov. 15, 1921
61,668 (Des.)	.....Sommer—Nov. 14, 1922
1,617,629	.....Gale—Feb. 15, 1927
2,025,101	.....Halpin—Dec. 24, 1935
2,369,943	.....Broudy—Feb. 20, 1945
2,394,332	.....Salem—Feb. 5, 1946
2,429,856	.....Vasquez—Oct. 28, 1947

With the exception of the design patent to Shanzer, the patents listed above were previously listed on page 3 of the Amended Answer in this action.

/s/ C. G. STRATTON.

Subscribed and sworn to before me this 2nd day of September, 1954,

[Seal] /s/ VESTA NELSON,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires 11/9/56.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 3, 1954. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Motion of defendant Harry Paris for Summary Judgment having been heard, the Court, being fully advised, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

(1) The plaintiffs in this action are Frances P. Syracuse and New Wonder Bag Corp. Frances P. Syracuse is a [40] citizen of the United States and a resident of the County of Los Angeles, State of California. New Wonder Bag Corp., is a California corporation having its principal place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

(2) Defendant Harry Paris is a citizen of the United States and a resident of the County of Los Angeles, State of California, and has a regular and established place of business in the City of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division.

(3) This action arises under the Patent Laws of the United States, set forth in 35 U.S.C., so that this Court has jurisdiction of the parties and of the subject matter of this action.

(4) United States patent in suit No. 2,533,850 was issued by the Commissioner of Patents of the United States on December 12, 1950, to one of the plaintiffs in this suit, to wit, Frances P. Syracuse, the patentee named in said patent, who, on or about January 5, 1951, assigned said patent to New Wonder Bag Corp., a co-plaintiff in this suit.

(5) United States Letters Patent in suit No. 2,533,850 relates to a utility handbag having a double central compartment with individual closures and two side compartments suitable for holding baby milk bottles. Its stated object is to provide a new and useful handbag having separate moisture-proof compartments, one of which is adapted to receive fresh diapers or other clothing, another being for damp or soiled diapers. End pockets are provided to hold bottles (baby milk bottles) or other equipment. The utility bag has two zippers on top for independent access to the two central or diaper compartments and a zipper on each side of the bag for opening and closing the milk bottle [41] compartments.

(6) The application for patent, Serial No. 773,-747, filed September 13, 1947, which matured into the patent in suit, originally contained five original claims. All of the original claims were cancelled in view of the cited art and a single specific claim was submitted by an amendment. This single claim was allowed and now appears as the only claim in the patent in suit.

(7) The patentability was predicated, according to the Patent Office file wrapper history of this patent, on a combination of two central compartments for fresh and soiled diapers, separated by a waterproof partition panel, and two waterproof end pockets for baby milk bottles, with slide fasteners providing individual access to these respective compartments and pockets.

(8) The Commissioner of Patents failed to cite against the application for the patent in suit the most pertinent prior art, including the following prior United States Letters Patent:

Shanzer, Des. Pat. No. 147,477,

which describes and shows the combination claimed in the patent in suit and shows said combination to be old. This Shanzer patent discloses a combined bottle and diaper utility bag having a single diaper compartment accessible from the top, end pockets and slide fasteners providing individual access to these respective compartment and pockets. Providing two top zippers and two top, side-by-side compartments would not be invention and would not involve any more than mechanical skill.

(9) The prior patents to Halpin, 2,025,101; Gale, 1,617,629; Vasquez, 2,429,856; and Nover, 1,235,049, were not cited by the Examiner during the prosecution of the application for the patent in suit through the Patent Office. The said Halpin patent shows two top zippers that lead to two side-by-side [42] top pockets. One of said pockets is waterproof for

receiving a wet bathing suit. Gale suggests that a waterproof pocket may be used for soiled diapers. Vasquez also shows side-by-side zippers leading to side-by-side pockets. Nover teaches side-by-side fasteners (before the days of zippers) leading to side-by-side, top compartments.

(10) The patent in suit does not disclose any patentable combination of elements, does not produce any novel results, and does not perform any new functions over the earlier Design Patent, No. 147,477, to M. Shanzer. The patent in suit does not disclose invention.

(11) Plaintiffs' patent is a combination patent and must be strictly construed.

(12) The device described in plaintiffs' patent does not represent discovery or patentable invention within the meaning of patent law.

(13) Plaintiffs' device was fully anticipated by the prior art and represents only the skill of a mechanic.

(14) The patent in suit and the only claim in said patent are devoid of any patentable novelty and, therefore, invalid.

Conclusions of Law

(1) There is no genuine issue as to any material fact necessary to the consideration and determination of said Motion for Summary Judgment.

(2) The patent in suit and its claim are invalid and void.

(3) The defendant Harry Paris is entitled to judgment declaring United States Letters Patent in suit, No. 2,533,850, invalid and void.

(4) Defendant Harry Paris is entitled to a judgment [43] dismissing the Complaint herein and may recover Court costs.

Dated at Los Angeles, California, this 22nd day of October, 1954.

/s/ ERNEST A. TOLIN,

Judge of the United States
District Court.

[Endorsed]: Filed October 22, 1954. [44]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Alan Franklin, being duly sworn, deposes and says: I am the attorney for the plaintiffs in the above-entitled action, and I am the owner of a handbag shown in the annexed photograph thereof, marked Plaintiffs' Exhibit X. Said handbag was given to me as a Christmas present, not later than a few days before Christmas, 1936, by my friend J. Calvin Brown, Attorney at Law, in the City and County of Los Angeles, California, and said hand-



Exhibit X

bag has been continuously in my possession since the time I received it during the year 1936 as aforesaid, and during said time I have used said handbag considerably for carrying my law books and other articles. I can fix the date when I received said handbag from Mr. Brown, as Christmas 1936, by the fact that I argued the appeal of the case of Bray, et al., vs. Hofco Pump Co., [55] Ltd., 93 F. (2d) 804, before the United States Court of Appeals in San Francisco, California, where I met Mr. Brown at the time near the end of the year 1937, who argued another case at that time before said Court of Appeals, and when I met Mr. Brown in San Francisco as aforesaid he noticed that I was carrying my handbag Exhibit X attached hereto. Said case, Bray, et al., vs. Hofco Pump Co., Ltd., supra was decided the following January 10, 1938.

/s/ ALAN FRANKLIN.

Subscribed and sworn to before me this 17th day of December, 1954.

[Seal] /s/ EUGENE N.

FRANKENBERGER,

Notary Public in and for the County of Los Angeles,
State of California. [56]

[Title of District Court and Cause.]

AFFIDAVIT

State of California

County of Los Angeles—ss.

I, J. Calvin Brown, being duly sworn deposes and says: That he has read the foregoing affidavit of Alan Franklin, concerning a handbag, Exhibit X, which affiant gave Mr. Franklin as a Christmas gift in 1936, and that the statement of Alan Franklin in respect to said gift in 1936 is true and correct.

/s/ J. CALVIN BROWN.

Subscribed and sworn to before me this 17 day of December, 1954.

[Seal] /s/ EUGENE N.

FRANKENBERGER,

Notary Public in and for the County of Los Angeles, State of California. [58]

In the United States District Court, Southern
District of California, Central Division

No. 15,994-T

FRANCES P. SYRACUSE; and NEW WONDER
BAG CORP.,

Plaintiffs,

vs.

HARRY PARIS; DOE I; et al.,

Defendants.

SUMMARY JUDGMENT

A Motion having been regularly made by the defendant Harry Paris for Summary Judgment in said defendant's favor, dismissing the present action,

Now this Court, on considering the affidavit, exhibits, deposition of the plaintiff Syracuse, the art not cited by the United States Patent Office in the prosecution of the patent in suit, and the Points and Authorities submitted in support of said Motion; after considering the plaintiff's Brief in Reply to Defendant's Motion for Summary Judgment; after considering the Brief Amicus Curiae of Alan Franklin; and after hearing counsel for the respective parties, and upon due deliberation having been had and Findings of Fact and Conclusions of Law of the Court having been signed, [68]

It Is Ordered, that said Motion for Summary Judgment be and the same is hereby granted, and judgment is hereby entered herein in favor of the

defendant Harry Paris, dismissing this action, with costs and disbursements to be taxed by the Clerk in favor of defendant Harry Paris and against the plaintiffs.

Dated at Los Angeles, California, the 11th day of February, 1954.

/s/ ERNEST A. TOLIN,
Judge of the United States
District Court.

Approved as to form:

.....
HAROLD SHIRE,
Attorney for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 11, 1955.

Docketed and entered February 15, 1955. [69]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Frances P. Syracuse and New Wonder Bag Corporation, a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Summary Judgment entered in this action on February 15, 1955.

/s/ ALAN FRANKLIN,
Attorney for Appellants, Frances P. Syracuse and
New Wonder Bag Corporation, a Corporation.

[Endorsed]: Filed March 11, 1955. [71]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

Good cause appearing therefor:

It Is Hereby Ordered that appellant may have to and including May 8, 1955, to file the record and docket the appeal in the above-entitled cause in the United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, April 8, 1955.

/s/ BEN HARRISON,
U. S. District Judge.

[Endorsed]: Filed April 8, 1955. [72]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

Good cause appearing therefor:

It Is Hereby Ordered that appellant may have to and including June 11, 1955, to file the record and docket the appeal in the above-entitled cause in the United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, May 5, 1955.

/s/ ERNEST A. TOLIN,
U. S. District Judge. [73]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF ORDER EXTENDING TIME TO FILE RECORD AND DOCKET APPEAL

State of California

County of Los Angeles—ss.

Alan Franklin, being first duly sworn deposes and says: I am the attorney for the plaintiffs in the above-entitled action. I was retained by the plaintiffs on the day of the hearing of the motion for summary judgment on too short notice to acquire a thorough knowledge of the facts of the case, and plaintiffs' attorney at the time, namely, Robert E. Geauque, evidently resenting my appearance in the case, withdrew from the case, and I have received no assistance whatever from him in preparing an appeal of this case, and, furthermore, I have never met plaintiffs' other attorney, Harold Shire, who, I am informed, is not a patent lawyer and I cannot expect any real help from him in this patent case. I did not solicit the [74] plaintiffs' case, in view of the fact that I have been so busy with other important legal matters. I was compelled to go to Washington, D. C., last month and argue a patent infringement suit against the U. S. Government, on April 4, 1955, in the Court of Claims, and that case, in which I was retained before I was retained in the present case, took up the greater part of my time last month, which prevented me for a substantial length of time from working alone on the appeal

of the present case. Recently I have found the case of Hycon Mfg. Co. v. H. Koch & Sons, 104 U.S.P.Q. 231 (CCA 9), which case involved a summary judgment and upholds the points and authorities of my Brief Amicus Curiae, which I filed in the present case, and particularly as to lack of jurisdiction of a trial court on motion for summary judgment in patent infringement suits on the issue of validity of a patent in suit, in view of the prior art, which issue necessarily involves technical questions of fact requiring a trial and the testimony of disinterested experts which was not present in the case at bar. The case of Hycon Mfg. Co. v. H. Koch & Sons, *supra*, holds as follows:

“Utmost that can be said in patent validity case is that it is a mixed question of law and fact. * * *

“The trial court exceeded the premissible limits of determination of disputed facts, questions without trial. * * * An indispensable prerequisite to such a summary judgment, is the absence of a material fact.”

An important relevant fact in this case, which the Court did not have before it in rendering summary judgment, is the extraordinary commercial success of the plaintiffs' patent in suit. Counsel for plaintiffs, Geauque, asked the defendant, Paris, in his deposition, the extent of his business in selling [75] plaintiffs' patented handbag, but counsel for defendant objected to such questions and the witness

refused to answer proper relevant questions on advice of counsel, thereby suppressing valuable evidence. Unfortunately, the Paris deposition was not filed and an exhibit of the defendants' accused handbag is not in evidence. These and other matters are matters which I have just recently discovered and I need more time to study the same to prepare the plaintiffs' appeal.

/s/ ALAN FRANKLIN,
Attorney for Plaintiffs.

Subscribed and sworn to before me this 6th day of May, 1955.

[Seal] /s/ LOUISE LELAND,
Notary Public in and for
said County and State.

My Commission Expires Mar. 29, 1958.

[Endorsed]: Filed May 6, 1955. [76]

[Title of District Court and Cause.]

CASH COST BOND ON APPEAL

Know All Men by These Presents, that Frances P. Syracuse is held and firmly bound unto Harry Paris, defendant, in the above case, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), tendered herewith in cash, to be paid to said defendant, his successors, assigns or legal representatives, for which payment well and truly to be

made the said Frances P. Syracuse binds herself, her successors and assigns firmly by these presents.

The condition of the above Obligation is such that:

Whereas, Frances P. Syracuse and New Wonder Bag Corporation, a corporation organized and existing under the laws of the State of California, are about to take an appeal to the United States Court of Appeals for the Ninth Circuit from that certain summary judgment heretofore entered in this action on February 15, 1955, in favor of the defendant by the United States District Court for the Southern District of California, Central Division, in the above-entitled case.

Now, Therefore, if the above-named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the surety, the Court may, upon notice to her of not less than ten days, proceed summarily and render judgment against her, in accordance with her obligation and award execution thereon.

Signed, sealed and dated this 19th day of May, 1955.

/s/ FRANCES P. SYRACUSE.

Examined and recommended for approval as provided in Rule 8.

/s/ ALAN FRANKLIN,
Attorney.

Duly verified.

[Endorsed]: Filed May 19, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Jack A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 88, inclusive, contain the original

Complaint;
Stipulation;
Amended Answer;
Motion for Summary Judgment;
Findings of Fact & Conclusions of Law;
Plaintiffs' Detailed Statement of Objections
and Reasons;
Summary Judgment;
Notice of Appeal;
Order Extending Time to File Record to
May 8, 1955;
Order Extending Time to File Record to
June 11, 1955;
Statement of Points on Appeal;
Plaintiffs' Designation of Contents of Record
on Appeal;

Defendant's Counter Designation of Additional Contents of Record;

which, together with Deposition of Frances P. Syracuse, taken on July 28, 1954, at Los Angeles, California, deft's exhibit C; File Wrapper and contents of the patent in suit; all in said cause,

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 28th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: *No. 14800. United States Court of Appeals for the Ninth Circuit. Frances P. Syracuse and New Wonder Bag Corporation, Appellants, vs. Harry Paris, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 29, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14800

FRANCES P. SYRACUSE and NEW WONDER
BAG CORPORATION, a Corporation,

Plaintiffs,

vs.

HARRY PARIS, DOE I, et al,

Defendants.

STATEMENT OF POINTS ON APPEAL

Plaintiffs, Frances P. Syracuse and New Wonder Bag, now file the following Statement of Points asserted as errors and intended to be urged in the prosecution of their appeal from the Summary Judgment entered herein on or about February 15, 1955, and assert that the trial court erred in each of the following respects, to wit:

1. In rendering summary judgment for the defendant, Harry Paris.

2. In holding and adjudging that the single claim of Patent No. 2,533,850, issued December 12, 1950, is invalid and void.

3. In granting the defendants' motion for summary judgment in favor of the defendant, Harry Paris, and dismissing this action with costs and disbursements to be taxed by the Clerk in favor of defendant, Harry Paris, and against plaintiffs.

4. In failing to hold and adjudge that the single claim of Letters Patent No. 2,533,850 in suit, issued December 12, 1950, is good and valid in law.

5. In failing to hold and adjudge that the single claim of Patent No. 2,533,850, issued December 12, 1950, is infringed by the defendant, Harry Paris.

6. In failing to deny and dismiss the motion for summary judgment of the defendant, Harry Paris, with costs, disbursements and an attorney's fee taxed against said defendant in favor of plaintiffs.

7. The trial court exceeded the permissible limits of determination of disputed fact questions, without trial.

8. In holding and adjudging invalid the single claim of the utility patent No. 2,533,850 in suit of plaintiff, Frances P. Syracuse, issued December 12, 1950, in view of the design patent for bag to Shanzer, No. 147,477, issued September 9, 1947, which Shanzer patent fails to show the mechanical construction and functional features of the claim of said plaintiff's utility patent; and all elements of said Shanzer patent are in the public domain, except two bows at diagonal corners of one side of the Shanzer bag, which bows are not present in the structure or the invention of the plaintiff's said utility patent, as claimed by the claim of the plaintiff's patent in suit.

9. Finding 8 of the trial court that the Commissioner of Patents failed to cite against the applica-

tion for the patent in suit the most pertinent prior art is clearly an error. The presumption is that the Patent Office did its duty and considered the other patents brought forward, on motion for summary judgment, as new prior art. There is no evidence dehoes these other patents, nor is there anything in the patents themselves which should overthrow the presumption that the Patent Office cited the best prior art against the application for the patent in suit.

10. In Finding 10 the trial court is clearly in error that the patent in suit does not disclose any patentable combination of elements, does not produce any novel results, or does not perform any new functions over the earlier design patent No. 147,477 to Shanzer. What function does the Shanzer design patent perform other than the function of ornamentation?—and the useful functions performed by the patent in suit cannot be anticipated by the ornamental function of the design patent of Shanzer or any other design patent. Design patents and utility patents are different, and independent legal entities, and are entirely noncognate. The questions of whether the patent in suit discloses any novel patentable combination or produces any novel results are questions of fact, over which the trial court had no jurisdiction on a motion for summary judgment.

11. The trial court is clearly in error in its **finding 11 that “Plaintiffs’ patent is a combination** patent and must be strictly construed, since practically all patents are combination patents including

primary patents, like the patent in suit, and primary patents are liberally construed.”

12. Error of the trial court in Finding 12 that there is no discovery or patentable invention covered by the patent in suit within the meaning of the patent law.

13. Error of the trial court in Finding 13 that the patent in suit is fully anticipated by the prior art and involves only mechanical skill. Finding 13 involves a question of fact and is fatal to the defendants’ motion for summary judgment.

14. Error of the trial court in Finding 14 that the claim of the patent in suit is devoid of any patentable novelty and is invalid, which finding involves a question of fact and defeats defendants’ motion for summary judgment.

15. The Findings of Fact 8, 10, 11, 12, 13 and 14 all involve questions of fact, over which the trial court was without jurisdiction on motion for summary judgment.

16. Error of the trial court in rendering summary judgment for the defendant, Harry Paris, and thereby preventing a fair trial of the case on its real merits, at which trial plaintiffs were prepared to prove extraordinary commercial success of the handbag covered by the patent in suit, of which success the defendant, Harry Paris, has derived the entire benefit by his wilful and wanton infringement of the patent in suit, and by his unfair competition with the plaintiffs in the manufacture and

In the
United States Court of Appeals
For the Ninth Circuit

FRANCES P. SYRACUSE and NEW WONDER BAG CORPORATION,	} <i>Appellants,</i>
vs. HARRY PARIS, et al.,	
	<i>Appellee.</i>

Appellants' Opening Brief

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In the
United States Court of Appeals
For the Ninth Circuit

FRANCES P. SYRACUSE and NEW
WONDER BAG CORPORATION,

Appellants,

vs.

HARRY PARIS, et al.,

Appellee.

No. 14800

Appellants' Opening Brief

JURISDICTION

This case is a Federal suit in equity for infringement of United States Letters Patent for an invention, and the jurisdiction of the District Court below is alleged in Paragraph I of the Complaint (Tr. p. 3) as follows:

“This cause of action arises out of the patent laws of the United States of America, U.S.C., Title 35, as amended, as hereinafter more fully appears.”

The jurisdiction of the District Court is admitted by the defendant, Harry Paris, in his Motion For

Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure (Tr. pp. 10-11).

The jurisdiction of the District Court is further admitted by the Findings of Fact and Conclusions of Law (Tr. pp. 14-18) and particularly by Finding of Fact (3) (Tr. p. 14) of said lower court.

The jurisdiction of the District Court is finally admitted by the Summary Judgment of said lower court (Tr. pp. 23-24).

This Honorable Court of Appeals has jurisdiction to review the final Summary Judgment of the lower District Court on appeal, pursuant to U.S.C.A., Title 28, Judiciary and Judicial Procedure, Chapter 83—Courts of Appeals, Secs. 1291, 1292(4) and 1294(1).

STATEMENT OF THE CASE

This suit is brought by the plaintiffs, Frances P. Syracuse and New Wonder Bag Corporation, a corporation, against the defendant, Harry Paris, et al., for infringement by said defendant, Harry Paris, of Letters Patent in suit No. 2,533,850, filed September 13, 1947, and issued December 12, 1950, to plaintiff (appellant) Frances P. Syracuse, for an invention in Utility Handbag Having Double Compartment With Individual Closures and Independently Accessible Bottle Pockets.

The plaintiff, Frances P. Syracuse, is a proper party plaintiff, in view of the fact that she is the

patentee of the patent in suit, and held the full right, title and interest in and to said patent from the date of its issue on December 12, 1950, to the date of her assignment of said patent, on January 5, 1951, to her co-plaintiff, New Wonder Bag Corporation, which period of entire ownership of the patent in suit by the plaintiff, Frances P. Syracuse, was within the six years statute of limitation prior to the filing of this suit on October 29, 1953.

The general concept of the invention of the said patent in suit is well stated in the first four introductory paragraphs of the first page, column 1, of said patent as follows:

“The present invention relates to handbags, and more particularly to the type of handbag used to carry diapers, bottles, and other articles required for the care of an infant while traveling or away from home.

The principal object of the invention is to provide a new and useful handbag having separate moisture-proof compartments, one of which is adapted to receive fresh diapers or other clothing, another being for damp or soiled diapers, and still others being provided to hold bottles or other equipment.

Another object of the invention is to provide a handbag having a plurality of compartments, each of which is accessible from the outside, independently of the others, through separate slide fastener closures of the type known popularly as zippers.

A further object of the invention is to provide a hand bag having separate compartments for fresh and soiled diapers, and still other compartments at the ends of the bag for holding bottles in an upright position, said bottle-holding compartments being accessible from the outside of the bag through slide fasteners in the ends thereof without opening the diaper-holding compartments of the bag. Such feature is particularly advantageous when traveling in public conveyances or when in congested public areas, since it eliminates the need for exposing the contents of the bag, and makes it possible to get at the bottle without searching through the interior of the bag. In addition to the convenience mentioned, such segregation of the bottles from the other contents of the bag is desirable because it prevents contamination of the nipples by soiled diapers, and provides positive assurance that the nipples will remain sterile until used."

Referring to the drawing of the patent in suit the basic features of the invention as disclosed in said patent comprise a rectangular bag, designated 10 in its entirety (Fig. 1), which bag is formed with a pair of longitudinal moisture-proof diaper compartments 33 and 34 (Fig. 2 of drawing) and a pair of end bottle pockets 50 and 50 formed at the ends, respectively, of said bag 10, (Figs. 1 and 3 of drawing). The longitudinal diaper compartments 33 and 34 are divided by an intermediate moisture-proof partition designated 32. (Figs. 2, 3 and 4). The inside of the bag 10 is lined with a moisture-proof lining 31, prefer-

ably of plastic sheeting, and the partition 32 is preferably formed by two spaced panels or walls 35 and 36 of moisture-proof plastic sheeting. (Figs. 2-4). The compartments 33 and 34 being lined with moisture-proof sheeting 31 one of said compartments is for the purpose of holding clean diapers or clothing, and the other compartment is for receiving damp or soiled diapers or other articles, whereby said clean diapers or clothing in one compartment 33 are prevented by said moisture-proof partition 32 from being dampened or soiled by damp or soiled diapers or other articles in the other compartment 34. The upper ends of the diaper compartments 33 and 34, are provided with longitudinal slits which may be opened or closed by zippers 23 and 24 respectively. (See Figs. 1-4 of patent drawing). The bottle compartments 50 and 50 extend vertically in the ends, respectively, of the bag 10 (Figs. 1 and 3 of patent drawing) and said pockets are adapted to receive and hold nursing milk bottles 51 in erect upstanding position. The ends 16 of the bag 10 are formed with vertically extending openings 44 for the pockets 50 and 50, respectively, through which openings 44 the milk bottles may be introduced into or removed from said pockets 50 and 50 respectively. Said vertical pocket openings 44 and 44 are normally closed by zippers 45 and 45, respectively, but said zippers may be opened, as indicated in Fig. 1 of the drawing, for introducing the milk bottles 51 and 51 into or removable from the pockets 50 and 50, respectively. The bottle pockets 50 and 50 are sepa-

rated from the diaper compartments 33 and 34 by waterproof plastic sheeting 46 (Fig. 3).

From the foregoing description it will be apparent that the handbag 10 provides separate, moisture-proof compartments 33 and 34 for holding clean dry articles in one of said compartments, and damp or soiled articles in the other. Each of said compartments 33, 34 is accessible from the outside through its own "zipper" closure 23 or 24 in the top of the bag, making it possible to get into either compartment without exposing the contents of the other. The two bottle pockets 50-50 in the ends, respectively, of the bag provide convenient receptacles for holding nursing bottles 51 in upright position, said bottles being segregated from the other articles in the bag, so that the nipples of said bottles cannot become contaminated by said other articles. The separate "zippers" 45 of each of the bottle compartments 50 makes it possible to get at either of the bottles 51 without opening the diaper compartments 33 and 34, which is a particularly convenient feature when it becomes necessary to remove or replace a bottle in the bag in congested public areas, or where the light is poor.

CLAIM OF PATENT IN SUIT

The single claim of the utility patent in suit, No. 2,533,850, with the reference numerals of the patent specification applied to elements, respectively, of said claim, is as follows:

“A handbag (10) for carrying clean and soiled infants' diapers and nursing bottles, comprising a rectangular body having horizontal top and bottom edges, and verticle sides (13 and 14) and ends (16), said top edge having two laterally spaced longitudinally extending openings (23 and 24) formed therein separated by a narrow strip of material (25), a waterproof partition panel (32) within said body dividing the interior thereof into two laterally spaced compartments (33 and 34), one of which is adapted to receive clean diapers, and the other being adapted to receive soiled diapers, the top edge (41) of said panel being attached to the underside of said strip of material (25), closure means for said openings (23 and 24) comprising rows of slide fastener teeth (26) attached to the material along opposite edges of each said openings, the two companionate rows of teeth (26) along the side of each of said (zipper) openings being adapted to intermesh with one another to close the opening, slide means (30) associated with each of said pairs of intermeshing rows of teeth (26), said slide means (30) being selectively operable from the outside of the handbag to open either one of said compartments (33 or 34) without opening the other, each of said ends (16) of said body having a vertically extend-

ing opening 44 formed therein, intermeshing slide fastener teeth (45) attached to the material along both edges of each of said openings (44) whereby the openings can be closed, waterproof plastic sheeting (46) attached to the inside of said handbag body along the inside edges of said end openings (44), said plastic sheeting (46) forming pockets(50) within the interior of said body in which nursing bottles (51) can be carried entirely separate from said diaper compartments (33 and 34), and protected from contamination, and a slide for operating each of said end slide fasteners (45) from the outside of the bag to provide access to either of said bottle pockets (50) without opening said diaper compartments (33 and 34)."

One of the plaintiffs' handbags, as covered by the patent in suit, was testified to by the defendant, Harry Paris, in his deposition taken by counsel for plaintiffs, July 28, 1954, at Los Angeles, California, on page 1 of his said deposition, which bag is marked Plaintiffs' Exhibit A for identification.

One of the accused handbags of the defendant, Harry Paris, which is charged by the complaint to infringe the claim of the patent in suit, is testified to by said defendant in his deposition on pages 10, 13 and 55 thereof and is marked Plaintiffs' Exhibit B, for identification.

Motion for Summary Judgment, pursuant to Rule 56, Federal Rules of Civil Procedure, was filed September 3, 1954, by the defendant (Tr. pp. 10-13).

Summary Judgment was granted and entered in favor of the defendant. Filed February 11, 1955. Docket and entered February 15, 1955. (Tr. pp. 23-24.)

STATEMENT OF POINTS RELIED UPON

The Points on Appeal (Tr. p. 32) to this Honorable Court, from the Summary Judgment of the trial court, may be regrouped as the Points Relied Upon by the appellants, as follows:

1. The Summary Judgment of the trial court is contrary to law.

2. The Order of the Summary Judgment of the trial court, to-wit:

“It is Ordered, that said Motion for Summary Judgment be and the same is hereby granted, and judgment is hereby entered herein in favor of the defendant Harry Paris, dismissing this action, with costs and disbursements to be taxed by the Clerk in favor of defendant Harry Paris and against the plaintiffs,”

is contrary to law.

3. Error in holding and adjudging that the single claim of the patent in suit No. 2,533,850, issued December 12, 1950, is invalid and void.

4. Error in failing to hold and adjudge that the single claim of Letters Patent in suit No. 2,533,850, issued December 12, 1950, is good and valid in law.

5. Error in failing to hold and adjudge that the single claim of the patent in suit, No. 2,533,850, issued December 12, 1950, is infringed by the defendant Harry Paris.

6. Error in failing to deny and dismiss the motion for Summary Judgment of the defendant Harry Paris, with costs, disbursements and an attorney's fee taxed against the defendant in favor of plaintiffs.

7. Error of the trial court in exceeding the permissible limits of determination of disputed questions of fact without a trial.

8. Error of the trial court in deciding and adjudging the claim of the mechanical utility patent in suit, No. 2,533,850 to be anticipated by the structurally and functionally different Shanzer ornamental design patent, Des. 147,477.

9. Error of the trial court in deciding and adjudging said mechanical utility patent in suit invalid and void in view of the structurally and functionally different Shanzer ornamental design patent.

10. Error of the trial court in finding (8) that the Commissioner of Patents failed to cite the most pertinent art, including the Shanzer Design patent, Des. 174,477, against the application for the patent in suit.

11. Error of the trial court in failing to find that the presumption is that the Patent Office did its duty and cited the most pertinent prior art against the application for the patent in suit, and considered the

other patents brought forward by defendant's counsel on motion for summary judgment, as new prior art.

12. Error of the trial court in failing to find that the additional patents set up in the Amended Answer by the defendant are not so close to the patent in suit as the prior art patents cited by the Patent Office against the application for the patent in suit, and particularly the patent of Holland, No. 2,447,940, which was cited by the Patent Office.

13. Error of the trial court in its finding 11 that Plaintiffs' patent is a "combination" patent and must be strictly construed, since practically all patents are combination patents, including primary patents like the patent in suit, and primary patents are liberally construed.

14. Error of the trial court in its finding 12 that there is no discovery or patentable invention covered by the patent in suit within the meaning of the patent law.

15. Error of the trial court in its finding 13 that Plaintiffs' device was fully anticipated by the prior art and represents only the skill of a mechanic.

16. Error of the trial court in its finding 14 that the patent in suit and the only claim in said patent are devoid of any patentable novelty and, therefore, invalid.

17. Error of the trial court in its findings 8, 10, 11, 12, 13 and 14, that said findings involve material ques-

tions of fact, over which the trial court was without jurisdiction on motion for summary judgment.

18. Error of the trial court in failing to find that the patent in suit covers a new and patentable combination of elements, which produces novel and useful results and performs new and useful functions over the Design Patent No. 147,477, to M. Shanzer, and thereby covers a patentable invention over said Shanzer design patent.

19. Error of the trial court in rendering summary judgment for the defendant, Harry Paris, and thereby preventing a fair trial of the case on its real merits, at which trial plaintiffs were prepared to prove extraordinary commercial success of the handbag covered by the patent in suit, which superceded all other handbags used for the same purpose and supplied a long-felt want in the handbag art, of which success the defendant, Harry Paris, has derived the substantial benefit by his wilful and wanton infringement of the patent in suit, and by his unfair competition with the plaintiffs in the manufacture and sale of the plaintiffs' meritorious invention covered by their said patent, which infringement and unfair competition of said defendant have destroyed the plaintiffs' business of manufacturing and selling their patented handbag covered by their patent in suit.

20. Error of the trial court in granting defendants' motion for summary judgment in view of the issue of infringement of the patent in suit raised by the pleadings, which issue is an issue of fact.

21. Error of the trial court in granting the defendants' motion for summary judgment merely on the affidavit of defendants' attorney, C. G. Stratton, denying the allegations of the complaint, which did not determine the issues, and particularly the facts of the case, and plaintiffs were not required to file opposing affidavits.

22. Error of the trial court in failing to deny and dismiss the defendant's motion for summary judgment, in view of the presumption of validity of the patent, since the basis of a suit on a patent is not the raw stuff of mere allegations of fact.

23. Error in granting summary judgment in the plaintiffs' patent infringement suit, since a patent in suit is presumed to be valid until proved invalid, beyond a reasonable doubt, and the defendant's single affidavit does not establish any such proof.

24. Error of the trial court in failing to deny the defendant's motion for summary judgment, on the ground that the alleged invalidity of the patent in suit, on its face, was not sufficiently obvious to authorize the trial court to render summary judgment against the plaintiffs dismissing plaintiffs' patent infringement suit.

25. Error of the trial court in granting summary judgment against the plaintiffs, in view of the fact that it was not clearly apparent that there was no issue of infringement of the patent in suit, and the issue of validity of said patent based on the prior art

should not have been determined on motion for summary judgment.

ARGUMENT

Points 1, 2, 6 and 21 through 25

Points 1, 2, 6, and 21 through 25 Appellants' Statement of Points Relied Upon in Appellants' Argument, present the gross error of the trial court in granting and ordering summary judgment to the defendant, Harry Paris, against the plaintiffs, contrary to the plaintiffs' meritorious cause of action and prayer for equitable relief of their complaint, and contrary to law, in view of the strong presumption of validity of the patent in suit and the lack of competent evidence to overthrow that presumption, and in view of the obvious fact that the handbag made and sold by said defendant, within the jurisdiction of the lower U. S. District Court, is a "Chinese" copy of and a wilful infringement of the claim sued on of the patent in suit No. 2,533,850.

"The granting of a patent is weighty evidence that the device or method is new and useful and that the patentee was the *first* inventor, and the burden is on the one who challenges validity to negative novelty in the plaintiff's patent. (*Eno v. Prime Mfg. Co.*, 58 P.Q. 681, Mass. S. Ct. (1943): see also, *International Carrier-Call & Tele. Corp. v. Radio Corp.*, 142 F. 2d 443 C.C.A. (1944): *Crosley v. Westinghouse*, 152 F. 2d 895, C.C.A. 3 (1945)."

Walker on Patents, Dellers Ed., 1952 Cumulative Supplement, Page 1272.

Points 3, 4, 8, 9, 10, 11, 12, 21, 24

The patent in suit of plaintiff, Frances P. Syracuse, No. 2,533,850, for Utility Handbag Having Double Compartment With Individual Closures and Independently Accessible Bottle Pockets, Filed Sept. 13, 1947, and issued Dec. 12, 1950, was pending in the Patent Office for over three years, during which time the application for the patent was subjected to critical and thorough examination by the expert Patent Office examiners, who cited as they were required to do, the nearest prior art relating to the invention covered by said pending patent application for the patent in suit, which prior art included the following patents:

Number, Patentee and Date.

1,136,138.....	Izet—Apr. 20, 1915
1,325,372.....	Penny—Dec. 16, 1919
1,653,246.....	Zichy—Dec. 20, 1927
1,902,313.....	Strubble—Mar. 21, 1933
1,029,686.....	Wehner—Feb. 4, 1936
2,274,718.....	Lyndes, et al.—Mar. 3, 1942
2,447,940.....	Holland—Aug. 24, 1948

In citing the above prior patents there is hardly a doubt that the Patent Office examiners cited the closest and best prior art relating to the patent in suit, since each patent examiner is a specialist in the particular class of inventions and patents which he is

employed to examine, and the U. S. Patent Office is the emporium of the arts and sciences of the world and the best place anywhere for making searches and investigations of patentable inventions. It is significant that despite the citation, by the Patent Office examiner, of the best art, as above listed, that has been found against the patent in suit, said patent was duly and regularly granted and issued by the Patent Office and carries the *strong presumption of validity, which presumption can only be overthrown by proof to the contrary beyond a reasonable doubt. Such proof involves material issues of fact, which cannot be adjudicated on a motion for a summary judgment.*

The only art set up by the defendant, Harry Paris, in addition to the *inapplicable* art set up by said defendant in his Amended Answer, (Tr. pp. 6-7) is the irrelevant Shanzer Design Patent, Des. 147,477, Sept. 9, 1947, set up in the affidavit of said defendant's attorney, C. G. Stratton (Tr. p. 13).

Said affidavit (Tr. pp. 12-13) refers to Defendant's Exhibit "C," which contains the five patents of Shanzer, D-147,477, Nover, 1,235,049, Gale, 1,617,629, Halpin, 2,025,101, and Vasquez, 2,429,856. Said patents were not cited by the Examiner in the Patent Office against the patent in suit No. 2,533,850, but were dug up unofficially as a result of an independent so-called search in the Patent Office by someone, whose qualifications for determining novelty and patentability of inventions are not shown to be better than or as good as the qualifications of the Patent Office

examiner, who carefully examined and allowed the application for the patent in suit. In the motion for summary judgment no patent expert testified to any vital probative facts concerning the patents contained in Defendant's Exhibit "C", which might invalidate the patent in suit. In the last analysis, the defendant's defense of invalidity of the patent in suit rests upon nothing but the uncorroborated affidavit of the defendant's attorney, C. G. Stratton (Tr. pp. 12-13), which did not determine the issues and particularly the facts of the case, and the plaintiffs were not required to file opposing affidavits, and moreover, the defendant's alleged invalidity of the patent in suit was not sufficiently obvious on the face of said patent or in view of the probative inadequacy of the prior art set up by the defendant, to justify the trial court in granting the defendant's motion for summary judgment dismissing the plaintiffs' meritorious suit against the defendant for willfully infringement of the plaintiffs' patent in suit.

The prior patents contained in the Defendant's Exhibit "C" will now be considered in their order.

The first patent of Max Shanzer, Des. 147,477, Sept. 9, 1947, for Combined Bottle and Diaper Utility Bag, Filed Sept. 17, 1946, is a design patent, which protects only its *ornamental design* and nothing else, while the plaintiffs' patent is *a new article of manufacture* and covers a Utility Handbag Having Double Compartments With Individual Closures and Independently Accessible Bottle Pockets, and the plaintiffs' patent

protects its *mechanical structure, operation and use*. The plaintiffs' *utility* patent and the prior Shanzer *design* patent cover entirely *different inventions* and are entirely noncognate. The filing date on the patent in suit, and the filing date on the Shanzer patent, are not necessarily the *dates of invention* of said patents, respectively, and since there is nothing on the face of said patents and no evidence to show whether Shanzer of the Shanzer patent or Syracuse, the patentee of the patent in suit, was the prior inventor, and since the patent in suit was filed on *Sept. 13, 1947, or less than a year* after the Shanzer patent was *issued* on Sept. 9, 1947, the defendant has failed to establish the fact that the Shanzer patent is *prior art* to the patent in suit, and consequently the Shanzer patent is of no probative value whatever, as an anticipation of the patent in suit, and it should be stricken or disregarded as such.

However, it is immaterial what the date of *invention* of the Shanzer patent may be, because the Shanzer patent does not show or describe the *invention* of the patent in suit, as *claimed* in the single claim of said patent on the last page, in the first and second columns of said page of the patent in suit. The claim of the patent in suit claims *two* longitudinal diaper compartments 33 and 34, closed at the top by "zippers" 23 and 24, respectively, and said patent claim, claims two end bottle pockets 50 at the ends, respectively, of the handbag 10, said longitudinal diaper compartments 33 and 34 being divided by a longitudinal *water-*

proof partition 32, and said end pockets 50 being closed by "zippers" 45 and divided from the ends of said diaper compartments by moisture-proof plastic sheeting partitions 46. The diaper compartments 33 and 34 contain an infant's clean diapers and soiled damp diapers, respectively, and the clean diapers in one compartment are prevented from being contaminated by the soiled damp diapers in the other compartment by the longitudinal moisture-proof partition 32. The end pockets 50 of the handbag 10, contain infants' nursing milk bottles 51, respectively, and the pocket partitions 46 prevent contamination of the milk bottles 51 in the pockets 50 by the soiled damp diapers in a diaper compartment 33 or 34.

The above-described *mechanical structure* claimed in the patent in suit is not disclosed in the Shanzer design patent, Des. 147,477, and for that reason the Shanzer patent fails to anticipate the claimed structure of the patent in suit. The Shanzer patent discloses only *one* longitudinal diaper compartment for both clean and soiled diapers, and since the Shanzer patent has no longitudinal moisture-proof partition in said single diaper compartment, said Shanzer patent does not have the claimed structure of the patent in suit to *perform the function and accomplish the new result of preventing soiled diapers from soiling the clean diapers* carried at the same time in the handbag. Moreover the Shanzer design patent does not disclose *end waterproof partitions*, such as the *partitions 46* of the patent in suit, to prevent the soiled

diapers in a diaper compartment 33 or 34 from contaminating the milk bottles 51 in the end pockets.

Aside from the fact that the *single* longitudinal zipper closed opening of the Shanzer design patent is no anticipation of the *two zipper-closed openings 23 and 24* of the patent in suit, is the fact that said *single longitudinal* zipper opening of the Shanzer patent was old in the art at the time the Shanzer application for patent was filed on Sept. 17, 1946, in view of the prior *single longitudinal zipper-closed opening in the top of the handbag of the Plaintiffs' Exhibit "X"* (Tr. p. 20) which handbag was given by J. Calvin Brown (Tr. p. 22), as a Christmas present to Alan Franklin a few days before Christmas 1936 (Tr. p. 18), nearly ten years before the filing date, Sept. 17, 1946, of the Shanzer design patent, Des. 147,477. The *single longitudinal zipper* opening of the Shanzer patent was in the *public domain* at the time the plaintiff Syracuse filed her application for the patent in suit on Sept. 13, 1947. The position of counsel for defendant, that there was no invention covered by the patent in suit in providing *two longitudinal zipper-closed* openings in the top of the handbag of the patent in suit, in view of the *single longitudinal zipper-closed* opening in the top of the Shanzer handbag, is not well taken. The *two* zipper-closed openings in the top of the handbag of the patent in suit are not just merely a duplication of the *single* zipper opening in the top of the Shanzer patent handbag, in view of the fact that the *two* zipper-closed openings in the handbag of the patent in suit

lead into two diaper compartments 33 and 34, divided by a waterproof partition 32, in which compartments, respectively, are carried clean diapers and damp soiled diapers and said waterproof partition 32 between said compartments prevents the damp soiled diapers in one compartment from contacting and soiling the clean diapers in the other compartment. This structure *performs a new and useful function and accomplishes a new and useful result, which constitutes a novel and patentable invention.*

Loom Co. v. Higgins, 105 U. S. 591.

Even if the Shanzer *design* patent and the *mechanical* patent in suit were identical, which they are not, and the Shanzer patent was prior to the patent in suit, the Shanzer design patent would be no anticipation of or bar to the grant of the *mechanical* patent in suit. On pages 107-108, Sec. 66, Patents for Designs, By Shoemaker, it is stated:

“The Patent Office and the Courts have declared that a design patent was no bar to the grant of a subsequent mechanical patent on the same article. . . . But a design patent and a mechanical patent relate to different subject matter. The first pertains to the *appearance*, while the second relates to the *mechanical structure* of a device, and it is well settled that a *design* and a *mechanical* patent covering the same article of manufacture may *co-exist*.”

The fact that the structure of the Shanzer patent and the patent in suit are not *structurally identical* or

functionally identical, in that the Shanzer patent does not have *two* diaper compartments 33 and 34, one for clean and the other for soiled diapers, with a *moisture-proof partition* 32 between said compartments *and with moisture-proof partitions* 46 between said compartments and the *bottle pockets* 50, are additional and controlling reasons why the Shanzer patent does not anticipate and invalidate the patent in suit.

In *Electro Mfg. Co. v. Yellin* (C. C. A. 7), 56 U. S. P. Q. 290, 292, 132 F. (2d) 979, it was held:

“Of course anticipation of a mechanical patent is not established by a *design patent which does not disclose the structure* of the mechanical patent.”

In *Ex parte Hughes and Fletcher*, 1924 C. D. 71, 328 O. G. 6, it was held:

“A design patent cannot be based upon *functional* features of a structure, or at least a design patent can not ever be used to appropriate *per se* the mechanical function.”

“In case of a mechanical (or utility) patent the vital question is ‘What will it do?’, whereas in a design case the corresponding question is ‘How does it look?’ *Rowe v. Blodgett*, 98 O. G. 1286; 1902 C. D. 583; 112 Fed. 61; 50 C. C. A. 120.”

The Shanzer design patent, Des. 147,477 not only fails to disclose the invention of the patent in suit, but fails to disclose any design invention. Plaintiffs’ Exhibit X (Tr. p. 20) with its *single zipper-closed*

opening along the top of the handbag and extending downwardly from the top in the *ends* of the bag, anticipates every design feature of the Shanzer patent, except the *two ornamental bows* at diagonal corners on one side of the handbag (Fig. 1 Shanzer patent), which *bows* are not included in the patent in suit.

The remaining patents, in addition to the aforesaid patent to Shanzer, which counsel for defendant alleges were not cited by the examiner in the Patent Office against the application for the patent in suit, and which said counsel assumes were important, but which counsel for plaintiffs contends were not the best art and are immaterial, will now be considered in order. Said remaining prior patents not cited by the Patent Office examiner are considered by the trial court in Finding of Fact 9, which finding counsel for plaintiffs asserts is in error in failing to find in said prior patents the novel and patentable *combination of elements* of the *claim* of the patent in suit. Said remaining patents are as follows:

Nover.....	1,235,049—July 31, 1917
Gale.....	1,617,629—Feb. 15, 1927
Halpin.....	2,025,101—Dec. 24, 1935
Vasquez.....	2,429,856—Oct. 28, 1947

The said Nover patent does not cover a diaper and nursing bottle handbag. It has no zipper-closed openings at the top of the pockets 15 and 28, respectively, nor any moisture-proof partition between said pockets to prevent soiled diapers in one of said pockets from

soiling the clean diapers in said other pocket. Moreover, said Nover patent shows no zipper-closed pockets for nursing bottles at the ends of the handbag nor any moisture-proof partitions between the ends of said diaper compartments and said end bottle pockets, as claimed in the patent in suit.

Said Gale patent is a valise with removable supports 21 for carrying liquid containers 23 in said supports in a large compartment which supports have to be removed from said compartment to permit the valise to carry other articles. The Gale valise has no separate *zipper-closed longitudinal openings in the top thereof for separate compartments*, respectively, nor any zipper-closed pockets in the *ends* of the valise for carrying nursing bottles in said ends, respectively.

The Halpin patent has no *zipper-closed pockets* in the ends, respectively, of the bag for carrying nursing bottles in said pockets, respectively. This receptacle is not intended or suitable for a diaper and nursing handbag. The novel *inventive concept* of the patent in suit is not disclosed in this Halpin patent.

The Vasquez patent for handbag is hexagonal in shape and does not have zipper-closed pockets in the *ends*, respectively, for carrying nursing bottles, which are very important for nursing infants. In the patent in suit there are two diaper compartments 33 and 34, with *zipper-closed openings 23 and 24 in the top* of said compartments, respectively, and said diaper compartments 33 and 34 are divided by a moisture-proof partition 32 there between, which prevents damp soiled

diapers in one of said compartments from contacting and soiling clean diapers in said other compartment. Said *function* of the moisture-proof partition 32 of the patent in suit in *preventing contamination* of the *clean diapers by the soiled diapers* is a *new and useful result*, which is not accomplished or even suggested by the Vasquez patent, in view of the fact that the Vasquez *partitions 12 between the compartments* of the handbag are *not moisture-proof partitions and do not function as such*. The *inventive concept of the invention of the patent in suit* is not disclosed within the *four corners of the Vasquez patent*, or any of the other *unofficial* prior art patents set up by the defendant, which were *not cited* by the Patent Office examiner. There is no question that the patent examiner cited the *best art* against the application for the patent in suit.

In *The Detroit Motor Appliance Co. v. Burk*, 4 F. 2d 118, it was stated:

“It is contended that the Patent Office did not have before it the prior art disclosed by the above-mentioned patents, except Brock and Lancaster. It is true that these two patents are the only citations in the file wrapper; but this is far from proving that the other patents were not considered. The presumption is that the officials of the Patent Office did their duty, and considered the other patents now brought forward as new prior art. There is no evidence dehores these patents, nor is there anything in the patents themselves

which in my judgment should overthrow the presumption."

In *Adler Sign Letter Co. et al., v. Wagner Sign Service, Inc.*, 112 F. 2d 264, the Court of Appeals of the Seventh Circuit, said (p. 267):

"The Bindhammer and Francis Patents were cited in the Patent Office, but not those of Sand and Standish. It is argued by Adler that it follows these two patents were overlooked by the Patent Office and, if the Patent Office had considered them, a different result would have been reached. We do not think it necessarily follows, however, merely from the fact that they were not cited, that they were overlooked. It is just as reasonable to conclude that they were considered and cast aside as not pertinent." (Citing the above *Detroit Motor Appliance* case.)

In the Finding 8 of the trial court that "Providing two top zippers and two top side-by-side compartments would not be invention and would not involve any more than *mechanical skill*," raises the issues of *invention and validity* of the patent in suit, which issues are held by the weight of authority, including the U. S. Court of Appeals, 9th Circuit, to be *issues of fact*, which requires evidence to prove, and *an issue of fact is fatal* to the defendant's motion for summary judgment.

The case of *Hanover Chemical Mfg. Co. v. David Butterick Co.*, 127 F. 2d 888 (1924) rationalizes

whether validity is a question of law or a question of fact, and concludes that validity and infringement are what the Supreme Court called the "ultimate facts" in *United States v. Esnault-Pelterie*, 299 U. S. 201, 205, 57 S. Ct. 159, 81 L. Ed. 123.

The following cases of the Ninth Circuit Court of Appeals treat the question of *invention* as one of *fact*.

Crowell v. Baker Oil Tool Co., 153 F. 2d 972 (1946);

Maulsby v. Conzevoy, 161 F. 2d 165 (1947);

Refrigeration Engineering v. York Corp., 168 F. 2d 896 (1948);

Faulk v. Gibbs, 174 F. 2d 34 (1948), and

Pointer v. Six Wheel Corp., 177 F. 2d 153.

In *Crowell v. Baker Oil Tool*, *supra*. (9th Cir.), this Court held:

"The question whether or not a new and useful combination is the result of mere *mechanical skill or of inventive faculty* is one of *fact*."

Thompson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 448, 449, 44 S. Ct. 533, 68 L. Ed. 1908.

Walker on Patents, Deller's Ed., Sec. 25, pages 112 and 113, states:

"That the question of *invention* is a question of *fact*."

Point 13

Referring to Finding 11 of the trial court that "Plaintiff patent is a *combination patent* and must be *strictly construed*," it is pointed out that it is rare indeed to find any claim in any patent issued in these modern times that is not a combination patent or *claim* which determines the scope of a patent.

"A *combination* is a union of *elements* which may be *partly old* and *partly new*, or *wholly old* or *wholly new*. But whether *new* or *old*, the *combination* is a *means—an invention*—distinct from them, (the elements). . . . In making the *combination* an inventor has the whole field of mechanics to draw from."

Leeds & Catlin v. Victor Talking Machine Co.,
213 U. S. 318, quoted in *Diamond Rubber
Co. v. Consol. Tire Co.*, 220 U. S. 428.

In the case of *Eibel Process Co. v. Minnesota and Ontario Paper Co.* (1923), 261 U. S. 45, 63, 43 S. Ct. 279, 79 L. Ed., Chief Justice Taft said:

"In administering the patent law the court first looks into the art, to find what the real merit of the alleged discovery or invention is, and whether it has *advanced the art substantially*. If it has done so, *then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves.*"

Walker on Patents (Deller's Ed.), Vol. 2, Sec. 247, Page 1212.

See also:

Pointer v. Six Wheel Corporation, 177 F. 2d 153 (C.C.A. 9).

In view of the granting of the patent in suit over the prior art cited against it by the Patent Office examiner, and the failure, as above pointed out, of the unofficial art, set up against said patent by the defendant's counsel to anticipate said patent, it is submitted that the novel *combination claim* of the patent in suit *has advanced the art substantially* and is entitled to a *liberal* construction by this Honorable Court, rather than a *strict* construction of the erroneous finding (11) of the trial court (Tr. p. 17).

Points 7, 17, 20 and 25

The findings 8, 10, 11, 12, 13 and 14 of the trial court obviously involved *genuine issues of material facts*, except as to the amount of damages, and said findings are clearly inhibited by Rule 56(c) of the Federal Rules of Civil Procedure. Moreover, said findings fly in the face of *Hycon Mfg. Co. v. H. Koch & Sons*, 104 U.S.P.Q. 231 (CCA 9), which held:

“The trial court exceeded the permissible limits of determination of disputed facts, questions without trial. . . . An indispensable prerequisite to such a summary judgment, is the absence of a material fact.”

Points 5, 20 and 25

These points 5, 20 and 25 involve the issue of *infringement*, which is a *question of fact*, and the court should not pass on the question of prior art and validity of the patent in suit, without giving the plaintiff an opportunity to establish his proof at trial. The defendant's proof of prior art and validity necessarily involve the question of *invention*, which is *not obvious on the face of the patent* in suit and is a *question of fact*.

In *Wiel v. N. J. Richman Co., Inc.*, 3 Fed. Rules Service, 56c. 41, page 548, the court held:

" . . . in a case where there appears an infringement, the court should not pass on the question of prior art in the validity of the patent, without giving the plaintiff an opportunity to establish his proofs at trial."

In *American Metal Cap Co. v. Anchor Cap & Closure Corp.*, 20 F. (2d) 725, the court held:

"Only in plainest case can invalidity of patent be ascertained merely on its face so as to authorize dismissal of infringement suit."

Infringement of the patent in suit, by the defendant, clearly appears upon a comparison of the defendant's handbag with the claim of the patent in suit, whereby said claim may be read, element for element, upon the elements, respectively of defendant's handbag, Plaintiffs' Exhibit "B" for Ident., Deposition of

Harry Paris, Pages 10, 13 and 55. Said defendant's handbag is a "Chinese" copy of the patent in suit, and of the plaintiffs' handbag, Plaintiffs' Exhibit "A" for ident., Deposition of Harry Paris, Pages 3, 8 and 9. Said Plaintiffs' Exhibit "A" is plaintiffs' handbag and is sold under the trade name "Tiny Tots Creation Co. of California," (Patent.)

Point 19

Plaintiffs are prepared to prove extraordinary popularity and commercial success of their patented handbag covered by the patent in suit, which the defendant has surreptitiously appropriated for his own selfish pecuniary benefit and unlawful aggrandizement, at the expense of the patentee plaintiff, Frances P. Syracuse, whose profitable business of manufacturing and selling her patented handbag in suit has been destroyed by the unlawful and unfair competition of the *defendant, Harry Paris*. In the Deposition of said defendant, plaintiffs' former attorney, Geauque, inquired a number of times of said defendant, as to the number of plaintiffs' patented handbags he had sold and the extent of the market demands he had received for the sale of plaintiffs' said patented handbag, but said defendant, Paris, invariably *refused to answer* any questions of the plaintiffs' counsel, Geauque, *on advice of counsel*, and *thereby suppressed all evidence of his extraordinary commercial success in selling the plaintiffs' highly meritorious patented handbag*. Unusual demand for, and commercial success of the plaintiffs' patented handbag, Plaintiffs' said Exhibit

“A”, for Ident., was admitted by defendant, Harry Paris in his deposition, Page 4, in which he testified that *he and about ten manufacturers produced the plaintiffs’ patented handbag*, (Plaintiffs’ Exhibit (“A”).

Points 14, 15, 16 and 18

In the last analysis, in view of the failure of the prior art not cited by the Patent Office examiner, as carefully considered herein, the findings 12, 13 and 14 of the trial court are clearly in error and should be reversed.

It is easy enough for any one, such as the infringing defendants, *after seeing* the plaintiff’s novel, useful and patented handbag, to assert that it is without the quality of invention, and that *any one could have thought of it*. That, however, is *knowledge after the fact*, or, as Judge Baker in *Regent Mfg. Co. v. Penn. Electrical & Mfg. Co.*, 121 Fed. Rep. 80, 83 (C.C.A. 7th), characterized it, as “*the ex post facto wisdom of the bystander.*”

The courts have many times pondered that issue, as above stated, and the authorities find that *the following factors, which plaintiffs are prepared to prove at a trial of the case, favor invention and patentability*, where the subject matter of the patent—

1. *Has beneficial results.*

Loom v. Higgins, 105 U. S. 580

2. *Has marked superiority.*

Diamond Rubber Co. of N. Y. v. Consolidated Rubber Tire Co., 220 U. S. 428; 131 S. Ct. 444.

3. *Was quickly adopted.*

Benjamin Elec. Mfg. Co. v. Northwestern Elec. Equip. Co., 251 Fed. Rep. 288.

4. *Was generally accepted and used.*

Morgan Eng. Co. v. Alliance Mach. Co., 176 Fed. Rep. 100.

5. *Was used by defendant.*

Farmers Handy Wagon Co. v. Beaver Silo & Box Co., 236 Fed. Rep. 731.

American Carmel Co. v. Glen Rock Stamping Co., 201 Fed. Rep. 363.

6. *Is easy and inexpensive to manufacture.*

Gen. Elec. Co. v. Hill, Wright Electric Co., 174 Fed. Rep. 996.

7. *Overcame objections of prior devices.*

Wellman-Seaver-Morgan Co. v. Wm. Cramp & Sons, Ship & Engine Bldg. Co., 3 Fed. Rep. (2d) 531.

8. *Displaced other devices.*

Minerals Separation, Ltd. et al. v. James M. Hyde, 242 U. S. 261, 37 Sup. Ct., 82.

9. *Was a commercial success.*

Nicholas Power Co. v. C. R. Baird Co., 222 Fed. Rep. 933.

In view of the leading authorities holding that the question of invention and validity of a patent are ques-

tions of fact, it is not surprising that the great majority of motions for summary judgment in patent infringement cases are denied.

Concerning the question of infringement, the *tribute of imitation* of the defendants in infringing the plaintiffs' patent in suit *is the strongest evidence of invention* of said patent.

Kurtz et al. v. Bell Hat Lining Co., Inc., 280

Fed. Rep. 277, 281 (C.C.A. 2).

Stiner Sales Co. v. Schwartz Sales Co., 98 F.

(2d) 999.

CONCLUSION

It is respectfully submitted that the subject matter of the patent in suit is new, that it constitutes an invalid, and the trial court's summary judgment should be reversed with costs and a reasonable attorney's fee to plaintiffs, that the defendant, Harry Paris should be adjudged to infringe the patent in suit and enjoined from further infringement of said patent.

Dated this 14th day of November, 1955.

ALAN FRANKLIN

Attorney for Plaintiffs

No. 14800.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANCES P. SYRACUSE and NEW WONDER BAG CORP.,
Appellants,

vs.

HARRY PARIS,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Introduction.

This appeal is from a Summary Judgment by Judge Ernest A. Tolin, United States District Judge, dismissing the Complaint because of his determination that the patent in suit, No. 2,533,850, is invalid and void.

It will be noticed that the patent in suit is not in the Transcript of Record. If the Court wishes to be technical, this appeal could be dismissed upon that ground alone. For the record, the appellee contends that this appeal should be dismissed upon the ground that the record is insufficient to determine whether the lower court was correct or not in its decision. However, without waiver of this ground, appellee discusses the validity of the patent in suit hereinafter.

The patent in suit is a very narrow one with but a single, long, specific claim. The patent covers a utility bag for carrying diapers and nursing bottles. The patent covers such a bag with (1) two top pockets, (2) two end pockets that can be opened without opening the top pockets, (3) zippers for closing the pockets, and (4) waterproofing material therefor. The patent, of course, does not cover what is put into the pockets, to wit, soiled and clean diapers and nursing bottles. The words "slide fastener" are used in the patent, but for simplicity, the common, generic word "zipper" is used in this Brief.

It is believed that the appellee will show this Honorable Court that the only claim in suit is completely anticipated by the prior art, and that every one of the above elements is old.

Shanzer Patent.

The closest prior patent is probably Shanzer Patent No. Des. 147,477.* This patent was overlooked by the Examiner in the Patent Office when the patent in suit was pending, and, as a result, the *prima facie* presumption of validity of the patent in suit is believed entirely gone.

In *Gomez v. Granat Bros.*, 177 F. 2d 266, 268 (CA 9), this Honorable Court held:

" . . . None of these prior patents were cited or considered by the patent office during the prosecution of the patent application for the Granat patent. In this situation it is argued that the presumption of *prima facie* validity is greatly weakened if not destroyed when pertinent prior art is not cited or con-

*Copies of all prior patents referred to in this Brief are bound herewith at the end of this Brief.

sidered by the patent office, and this court has so held. *Stoody v. Mills Alloys*, 9 Cir., 67 F. 2d 807; *Mettler v. Peabody Engineering Corp.*, 9 Cir., 77 F. 2d 56; *McClintock v. Gleson*, 9 Cir., 94 F. 2d 115. See, also: *France Mfg. Co. v. Jefferson Electric Co.*, 6 Cir., 106 F. 2d 605; *Seiberling Rubber Co. v. I. T. S. Co.*, 6 Cir., 134 F. 2d 871. It seems clear that these patents must be classified as pertinent prior art."

See also *Schmeiser v. Thomasian*, 106 USPQ 213 (CA 9), in which this Honorable Court affirmed the District Court's finding that a certain reference

" . . . is more pertinent to the alleged invention . . . than any of the cited art . . . This Henderson patent destroys the presumption of validity of the . . . patent . . . in suit."

The Shanzer patent is a design patent and is, therefore, classified in a different place in the Patent Office than the patent in suit, which is a mechanical patent. This is probably the reason why the Examiner overlooked the Shanzer patent. The patent in suit itself shows that it is classified in Class 150, subclass 34 (page 1 of patent in suit) while the Shanzer patent shows that it is classified in Design Class 87, subclass 3 (page 1 of said patent).

The Shanzer patent shows and describes a design for a "Combined Bottle and Diaper Utility Bag" (see its title, specification and claim). Fig. 1 is "front . . . view" of the bag. Fig. 2 is an end view of the bag with an end zipper open, showing "the right-hand bottle compartment in open position." Fig. 3 is a top view of the bag with the top zipper open, showing "the diaper compartment in open position."

The "circular elements" at the ends of the zipper in Fig. 3, are "the wall portions of the bottle compartments."

Briefly, the Shanzer patent has (a) a top pocket for diapers, (b) two end pockets for nursing bottles, which can be opened without opening the top pocket, and (c) zippers for separately closing the top and end pockets.

The only feature missing is that Shanzer has only one top pocket. However, having two top pockets would be mere multiplication and would not amount to invention. If it were invention to have two pockets instead of one, then it would be patentable to someone else to provide three pockets instead of two, it would be patentable to another person to provide four pockets, and still another could get a patent on five pockets, *ad infinitum*. This is believed to reduce to an absurdity the appellants' claim that the patent in suit is patentable over Shanzer because it has merely multiplied the pockets and has two diaper pockets instead of one!

The courts long since have recognized that mere multiplication is not invention. As stated in *John Bean Mfg. Co. v. Creagmile*, 123 F. 2d 182, 185-186 (CA 9),

"Nor can invention be predicated on the mere multiplicity in use of ancient devices."

Appellant's argument that there is a new, patentable combination in having two diaper pockets is believed completely answered by pointing out that each diaper pocket in the patent in suit performs its function (of holding diapers) without any help from, or cooperation with, the other diaper pocket. They are placed side by side in a mere aggregation for convenience merely, the same as in the famous pencil eraser case of *Reckendorfer v. Faber*,

92 U. S. 347, 23 L. Ed. 719, which held that an eraser at the end of a pencil was not patentable even though

“ . . . It may be more convenient . . . This, however, is not invention within the patent law, as the authorities cited fully show. There is no relation between the instruments in the performance of their several functions, and no reciprocal actions, no parts used in common.”

The two conveniently but entirely independent pockets are a mere aggregation. The argument that one pocket is for clean diapers and the other is for soiled diapers merely states the *use* of them, and does not define a new construction that is patentable. The particular use of the pockets is not patentable.

Furthermore, it would not involve invention to make Shanzer's bottle pockets of waterproof material, if they are not so already. This would be mere substitution of materials, which is not patentable. The mere substitution of rubber for other material has been held not to involve invention in *U. S. Appliance Corp. v. Beauty Shop Supply Co.*, 121 F. 2d 149, 150 (CA 9):

“A consideration of these prior patents shows similar devices and it will be found that the patented device merely substitutes flexible rubber for other material used in the prior art to make a jacket. A substitution of one material with known characteristics for another material does not rise to the dignity of invention. *Rubber Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; *Oliver-Sherwood Co., et al. v. Batterson-Ballagh Co.*, 9 Cir., 95 F. 2d 70. Similar jackets are found in the prior art.”

The prior patents cited hereinafter and bound at the end of this Brief show that waterproof material is well known in the art of utility bags.

See, also, *Heath v. Frankel*, 153 F. 2d 369 (CA 9), to the effect that “mere substitution of one material for another is not patentable” in the absence of new and unexpected results. It is certainly not new or unexpected that waterproof material would be desirable between soiled diapers and a baby’s nursing bottle.

Gale Patent.

If there were any doubt that there *might* be invention involved in providing a diaper-nursing bottle utility bag with (1) two pockets for diapers instead of only one pocket, or (2) waterproof material for such pockets, all such doubt would be quickly resolved against the patent in suit when Gale Patent 1,617,629 (which was also overlooked by the Examiner) is considered.

Gale’s utility bag not only has holders for two or more nursing bottles, but also has two waterproof, open-topped pockets for diapers! First, Gale provides “any number” (page 1, line 106) of holders 21 for nursing bottles 23. Second, Gale shows a pocket 24 that is “open at its top . . . to receive soiled apparel.” Third, Gale suggests “waterproof material” (page 2, line 6) for the diaper pockets. Moreover, Gale suggests the provision of a second “identical pocket 24” (page 2, lines 23-26) whereby two open-topped, waterproof pockets would be provided in his utility bag.

To provide Shanzer with two diaper pockets instead of one, as suggested by Gale, and to make such pockets waterproof, as also suggested by Gale, would scarcely seem to involve invention. Nothing new would be involved.

Halpin Patent.

If doubt still persisted that invention might be involved over Shanzer and Gale combined because the patent in suit uses zippers on both of its diaper pockets, Halpin Patent 2,025,101 would seem to dispel such doubt entirely.

Halpin (also overlooked by the Examiner in the patent in suit) has two open-top pockets in a small handbag that are independently closed by zippers 29 and 30 (page 2, column 1, lines 33-35). The zipper 30 closes the top opening of a compartment or pouch 36, and can be opened "without disturbing the contents of the main bag compartment" (page 2, column 2, lines 26-27), which second compartment is opened by zipper 29 (see Fig. 4 of Halpin's drawing).

Here again we see that it is not new to provide two top-zippered compartments in a handbag with a "rubber" (page 2, column 2, line 9) partition between the two compartments. Halpin suggests that this is to contain "a wet bathing suit and the like," but its usefulness for a soiled diaper is equally clear. It is submitted that using one of the pockets of Halpin for soiled diapers instead of a wet bathing suit would only be finding a different use for an old article, which is well established as not constituting invention. As stated in *Walker on Patents*, Deller's Edition, page 228:

"It is likewise not invention to use an old article of manufacture for a new and analogous use." (Citing five Supreme Court cases.)

Halpin is also thought to anticipate another feature of the claim of the patent in suit. Not only does Halpin have the "waterproof partition panel within said body dividing the interior thereof into two laterally spaced com-

partments, one of which is adapted to receive clean diapers, and the other being adapted to receive soiled diapers" (as stated by the claim of the patent in suit) but also "the top edge of said panel [is] attached to the underside" of the "strip of material" between the two top openings. The fact that this strip is claimed as "narrow" is no patentable distinction. However, the portion of the top wall 11 of Halpin between the zippers 29 and 30 is narrower than the bottom 15, so it is narrow by comparison.

Making the bottle pockets of Shanzer of waterproof material would not seem to involve any invention, since both Gale and Halpin suggest the uses of waterproof material when and where waterproofing is desirable. It can hardly seem that the use of waterproof material where useful would rise to the dignity of invention.

Nover Patent.

Nover Patent 1,235,049 is cited to show that it is old to have side-by-side, open-top pockets in a handbag with the dividing panel fastened to a "narrow strip of material" between the openings. The narrow strip is shown at 14 in Nover, and the inner, abutting stretches of the pockets 15 and 28 together constitute a "panel" that is "attached to the underside of said strip of material," as covered in the claim of the patent in suit.

Vasquez Patent.

Vasquez Patent 2,429,856 is cited to show the use of zippers in handbags in a multitude of places: top, ends, sides; in fact, anywhere desired. Nover and Vasquez were also overlooked by the Examiner.

It is submitted that it would not constitute invention to substitute Vasquez' zippers for Nover's clasps 21 and 30, to provide two side-by-side pockets that could be opened separately from the top.

Summarizing Prior Patents.

Summarizing the prior art in this case, every single thing in the claim in suit is old in handbags: (1) a handbag for carrying clean and soiled diapers (Gale and Halpin patents); (2) a handbag for carrying nursing bottles (Shanzer and Gale patents); (3) a utility bag "having horizontal top and bottom edges, and vertical sides and ends" (Shanzer patent); (4) the top having "two laterally spaced, longitudinally extending openings" (Gale, Halpin and Nover patents); (5) "narrow strip of material" separating said two openings (Halpin and Nover patents); (6) "waterproof partition panel within said body dividing the interior thereof into two laterally spaced compartments" (Halpin and Gale patents); (7) "top edge of the panel being attached to the underside of said strip of material" (Halpin and Nover patents); (8) zippers "selectively operable from the outside of the sandbag to open either one of said compartments without opening the other" ("handbag" is no doubt meant, instead of "sandbag") (Halpin and Vasquez patents); (9) end "pockets for nursing bottles" in order "to provide access to either of said bottle pockets without opening said diaper compartments" (Shanzer patent); and (10) waterproofing pockets when needed (Gale and Halpin patents).

In short, there is absolutely nothing new in the claim in the patent in suit. It is all old. It seems safe to assert that if the Examiner had found the Shanzer, Gale, Halpin, Nover and Vasquez patents, he would never have allowed even the one narrow claim of the patent in suit.

It did not involve a patentable combination to bring together old elements in an old aggregation. The case of *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, 87 USPQ 303, very strongly emphasized this. See what has been called by the Fifth Circuit, “Mr. Justice Jackson’s classic admonition”:

“Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly.” (See, also, *Robinson v. DiGaetano*, 212 F. 2d 1, 101 USPQ 161 (CA 5).)

In the present case, there is no patentable combination, the old elements perform their old functions in the old manner. The patent in suit certainly “added nothing to the total stock of knowledge.”

This Honorable Court recently stated the same principle in the case of *Schmeiser v. Thomasian*, 106 USPQ 213, 215 (CA 9), saying that “the applicable law has been laid down in this circuit as follows” (quoting from *Magarian v. Detroit Products Co.*, 128 F. 2d 544, 545, 53 USPQ 658, 660 (CA 9):

“The combining of old elements does not rise to the dignity of invention unless a new result is pro-

duced or unless an old function is performed in a new way. *Bailey v. Sears, Roebuck & Co.*, 9 Cir., 115 F. 2d 904, 906, 47 USPQ 407, 410. To render invalid the claim of a combination patent it is not necessary that all the elements of the combination be found in a single prior patent. "If they are all found in different prior patents and no new functional relationship arises from the combination, the claim cannot be sustained." *Eagle v. P. & C. Hand Forged Tool Co.*, 9 Cir., 74 F. 2d 918, 920, 24 USPQ 181, 182; *Mettler v. Peabody Engineering Corporation*, 9 Cir., 77 F. 2d 56, 57, 25 USPQ 307, 308. Appellant's device involved no more than mechanical adaptation of old parts.'"

Appellee's Condition.

Appellee is a small business man who has not had enough business even to incorporate. The expense of this case to date has been very oppressive upon him. Even defending himself in the lower court and prosecuting this appeal has by his standards been very expensive and a tremendous burden and a hardship.

It is, therefore, respectfully and sincerely pleaded that this case be determined by this Honorable Court upon the record before it and not be sent back for a trial. The appellants had ample opportunity to file any affidavits in the lower court which they desired. Both appellants' present counsel and former counsel were present during the oral argument below, and appellants' present counsel and J. Calvin Brown, another well-known patent lawyer, both filed affidavits [Tr. of Rec. pp. 18-22] in due time prior to the date of said hearing, and which were duly considered by the lower court. Appellants' present counsel also filed a Brief Amicus Curiae in the lower court [Tr.

p. 27, line 5], which was also considered by the lower court before rendering its decision in this case. No disputed issues of fact were raised by said affidavits. It is believed that appellants have had their day in court.

The appellee has submitted his defenses in the present Brief, and it is believed that the full record is before this Honorable Court. At a trial, appellee would present this same prior art and it is believed that the result would be the same.

It is submitted that nothing could be gained by sending this case back to the lower court. To do so would burden appellee further in addition to an already overpowering load.

If it seemed that appellants might win eventually by a trial of this case, there certainly would be merit in sending this case back, but in view of the series of very close prior patents which were overlooked by the Examiner, it would appear that no trial could produce any other result than already obtained, to wit, that the very narrow patent in suit is invalid because every single feature is old in one or more prior patents, and there is no patentable combination shown in the patent in suit. It would seem that if there ever was a case that should be affirmed, this is the one.

Hycon Case.

It is believed that the case of *Hycon Mfg. Co. v. H. Koch & Sons*, 104 USPQ 231 (CA 9), principally relied upon by appellants, is not in point in the present case. There is no dispute as to the material facts in the present case, and all such facts are at this time before this Honorable Court. The trial court has weighed the evidence, documentary and testamentary, so, as stated in footnote 2

to the *Hycon* case, "there is a strong policy for affirmation on appeal."

The interest of the public, as pointed out by this Honorable Court in said case, is paramount. The decision by the lower court in this case, holding the patent in suit invalid does "relieve the public from an asserted monopoly" (footnote 11 of the *Hycon* case).

The instant case lacks other phases of the *Hycon* case. In that case, there was "an effort to present some testimony which was precluded because it was indicated the nature of a summary judgment prevents the trial of any issue of fact." No testimony was precluded in this case.

In the *Hycon* case, the lower court did not find facts, but only rendered "mere conclusions in order to hold a patent valid." Moreover, there was no indication "why the trial judge thought the device was an invention nor why the patented article was differentiated from the prior art." In the present case, the lower court did find facts, to wit, the prior patents, and distinctly pointed out [Tr. pp. 16-17, pars. "8" to "14"] why the present device was not patentable over the prior art, and why it could not be differentiated from the prior patents which were overlooked by the Examiner.

Moreover, this Honorable Court held that the findings of fact in the *Hycon* case "were entirely inadequate." It is believed that the findings in the present case are complete, specific and factual, so that the present case is not presented upon "an inadequate basis laid by interested parties" who joined together in motions for summary judgment which did not adequately present or determine facts, as was done in the *Hycon* case.

It is believed that the present case does not place upon this Honorable Court the burden of trying this case, but rather permits “exercising the normal function of review,” for which this Honorable Court is constituted, as pointed out in the *Hycon* case.

For these several reasons, it is believed that the *Hycon* case is not determinative of the present issues and is not authority for sending the present case back for trial upon facts which are undisputed. “An indispensable prerequisite to a [summary] judgment is the absence of a material question of fact,” as this Court stated in the *Hycon* case. Any expert called by appellants could not change the undisputed facts of the existence and disclosures of the prior art. There is no issue of any material fact in the present case!

The Fifth Circuit in a case since the *Hycon* case, to wit, *Frits W. Glitsch & Sons v. Wyatt Metal & Boiler Works*, 106 USPQ 162 (CA 5, July 15, 1955) stated:

“ . . . the issue of whether a particular patent meets the requisite standard of invention essential to validity is now generally regarded as a fully reviewable question of law.”

Design Patent Anticipates.

A large part of Appellants' Brief is spent trying to establish what is believed to be a false premise, to wit, that a design patent cannot anticipate a mechanical patent. It is submitted that appellants' authorities do not establish this proposition.

On the contrary, it seems quite clear from the authorities, which appear to be squarely in point, that a design patent may anticipate a mechanical patent, if it shows what is covered in the mechanical patent. As stated by

Judge Learned Hand in *H. C. White Co. v. Morton E. Converse & Son Co.*, 20 F. 2d 311, 313 (CA 2), cert. den. 275 U. S. 547, 72 L. Ed. 419:

“A design patent may anticipate a mechanical, *Lein v. Myers*, 105 F. 962 (C.C.A. 2).”

See also the following from the three-judge bench of the Court of Customs and Patent Appeals, in Washington, D. C.:

“It is well-established law that a design patent may anticipate a mechanical patent and vice versa. *In re Walter*, 39 F. (2d) 724, 17 C.C.P.A. 982; *In re Dalton*, 37 F. (2d) 420, 17 C.C.P.A. 826; *In re Eifel*, 35 F. (2d) 70, 17 C.C.P.A. 582; *In re Staunton*, 35 F. (2d) 63, 17 C.C.P.A. 579; *In re Rutledge*, 47 F. (2d) 797, 18 C.C.P.A. 1081; *Lein v. Myers et al.* (C.C.A.), 105 F. 962; *White Co. v. Converse & Son Co.* (C.C.A.) 20 F. (2d) 311”

In re Hargraves, 53 F. 2d 900.

It is believed that the foregoing high-type of authorities, that are squarely in point, clearly establish that a design patent is a proper anticipation against a mechanical patent, for everything that is shown in the design patent.

Exhibit X.

Appellants have placed in the record affidavits relating to Exhibit X, a brief case which appellants' counsel received as a present some years ago. This exhibit was introduced in an effort to show that the Shanzer patent is invalid. Appellee does not contest this, or raise an issue thereon (although, in passing, it might be said that it is believed that the conventional brief-case of Exhibit X does not anticipate the appearance or design of Shanzer's

utility, diaper-nursing bottle bag). However, it is immaterial whether the Shanzer patent is valid or invalid. It is still a prior patent. As clearly stated in Title 35, U. S. C. 102(a), a person is not entitled to a patent where,

“(a) the invention was . . . patented.”

The statute does not state that the prior patent has to be a valid one before it can anticipate. Any patent, valid or invalid, constitutes an anticipation of any subsequent patent on the same subject matter. Thus, Exhibit X is immaterial as far as the pertinence of the Shanzer patent is concerned.

Conclusion.

In conclusion, it is submitted that the patent in suit is clearly invalid in view of the prior art overlooked by the Examiner, and that the judgment of the lower court, based upon full and complete findings, should be affirmed.

Respectfully submitted,

C. G. STRATTON,

Attorney for Appellee.

WARNER, PERACCA & COWAN,
HENRY M. COWAN,

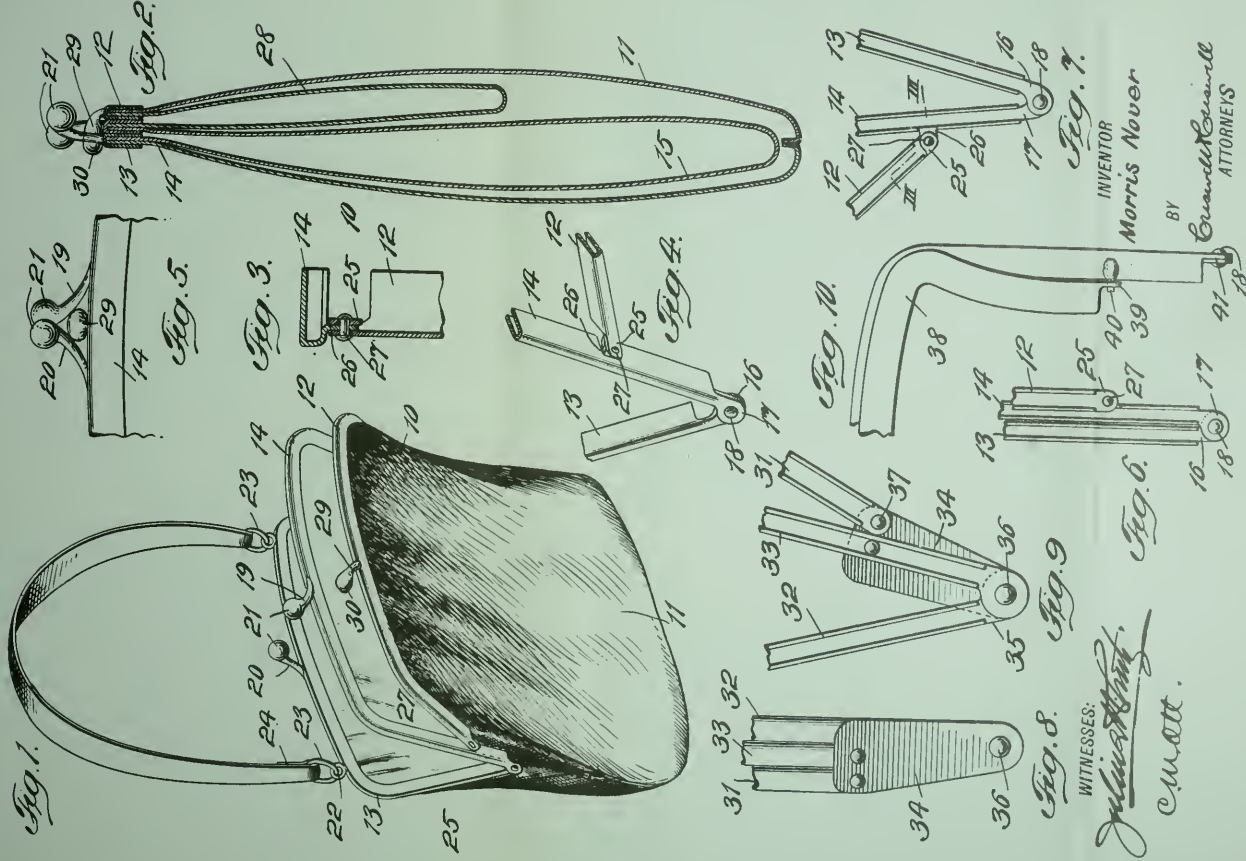
Of Counsel.

M. NOVER,
HAND BAG.

APPLICATION FILED MAR. 26, 1915.

1,235,049.

Patented July 31, 1917.



WITNESSES:

Julius H. Matt.
c. matt.

INVENTOR

Morris Nover

BY

Ernest C. Bunnell
ATTORNEYS

UNITED STATES PATENT OFFICE.

MORRIS NOVER, OF NEW YORK, N. Y.

HAND-BAG.

1,235,049.

Specification of Letters Patent.

Patented July 31, 1917.

Application filed March 26, 1915. Serial No. 17,187.

To all whom it may concern:

Be it known that I, MORRIS NOVER, a citizen of the United States, and a resident of New York, county and State of New York, have invented certain new and useful Improvements in Hand-Bags, of which the following is a full, clear, and exact description.

This invention relates more particularly to small hand-bags for the use of women.

One of the primary objects of the invention is to provide a hand-bag in which there are one or more deep pockets for carrying various articles, and a shallow pocket adapted for small articles as change, handkerchiefs or the like, and which are so arranged as to permit independent access to the different pockets.

Another object of the invention is to provide a hand-bag or the like in which one member of a metal frame serves as a hinged connection for other frame members, and which support deep and shallow pockets.

Another object of the invention is to provide a simple and efficient hinge for the frame members.

A further object of the invention is to provide simple and efficient means whereby the frame members for the pockets may be pivoted at different points.

A still further object of the invention is to provide a simple and efficient clasp for the frame members of the different pockets to permit independent access to the pockets.

With these and other objects in view, the invention will be hereinafter more particularly described with reference to the accompanying drawings which form a part of this specification, and will then be pointed out in the claims at the end of the description.

In the drawings, Figure 1 is a perspective view of one form of device or article embodying my invention, showing the frame members positioned for access to both pockets.

Fig. 2 is an enlarged vertical section of the device, with the clasp in a closed position.

Fig. 3 is an enlarged transverse section, taken on the line III-III of Fig. 1, showing one form of hinge for the frame members of the small pocket.

Fig. 4 is a fragmentary perspective view of the hinge portions of the frame members. Fig. 5 is an enlarged front elevation of the clasp.

Fig. 6 is a fragmentary inside elevation of the hinge portion of the frame, the parts being shown in a closed position.

Fig. 7 is a view similar to Fig. 6, except that the frame members are shown in an open position.

Fig. 8 is a fragmentary side elevation of the frame members showing a different form of hinge.

Fig. 9 shows the hinge of Fig. 8, looking in an opposite direction and in an opened position; and

Fig. 10 is a fragmentary side elevation of still another hinged connection between the frame members for the small pocket.

The device 10 has an outer cover or body 11 of leather or of any other suitable material. The cover at one side and at the upper edge thereof is held to an outer frame member 12, while at the other side the cover is held to an outer frame member 13.

An intermediate, inner or central frame member 14 is provided, which corresponds in size and shape to the member 13 but is larger than the frame member 12, the three members forming substantially a single element or frame. A pocket 15 of substantially the depth of the cover 11 is arranged therein, and has one edge thereof held to the outer frame member 13, and the other edge to the inner frame member 14, so that when the two members 13 and 14 are opened or separated as shown in Fig. 1, access may be had to the pocket 15, or when the frame members are moved to the position shown in Fig. 2, the mouth of the pocket is closed.

The frame members 13 and 14 are substantially U-shaped in form although they may vary so far as the form is concerned, and each member is substantially U-shaped in cross-section to provide clamping flanges.

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1,310-64

The members 13 and 14 are cut away to provide integral lugs or projections 16 and 17 respectively, which are pivoted together by a rivet 18 or otherwise on opposite sides of the metal frame to adapt the said members 13 and 14 to be moved toward or from each other in the usual way.

A clasp member 19 is held to the frame member 14, and a corresponding clasp member 20 is held to the member 13. Each clasp has a ball or engaging portion 21 which are adapted when forced past each other to engage frictionally in such a way so as to hold the members 13 and 14 in close relation to close the mouth of the pocket or permit access thereto. The frame member 13 has an eye 22, at each side thereof, in which a ring 23 is held and to each ring is held one end of a strap or handle 24, it being understood that the strap or handle may be attached to any of the other frame members.

The frame member 12 is substantially the same shape as the frame members 13 and 14, but not of the same depth. The frame member 13 has its ends cut away to provide a hinged part or lug 25 at each end and is pivoted to the member 14 above the hinge provided by the lugs 16 and 17. A lug 26 is formed integral with the frame member 14 at each side thereof by cutting away one side of the frame member, and the lug 25 of the member 12 is pivoted to the lug 26 by a rivet 27 or in any other suitable way. A pocket 28 of any suitable material, much less in depth or smaller than the usual pocket 15 has one side thereof held between the flanges of the frame member 12, and the other side of said pocket is held between the flanges of the frame member 14.

It will be evident that the pocket 28 by reason of its shallow character may be made to contain articles to which access is frequently required, while the other or deeper pocket may be made to contain articles of greater value and wherein access is not always desirable particularly in public places.

To hold the frame member 12 in a closed position and to close the mouth of the pocket 28, I provide a member 29, which may have a knob 30 and which is adapted to frictionally engage the upper surface of the frame member 14 between the closed 55 members 19 and 20. The member 29 may be forced from between the members 19 and 20 without disengaging said members 19 and 20, and in order that the clasp member 29 may be readily moved to a disengaged position, the knob portion 30 may extend outwardly beyond and over the frame 13 a sufficient distance for this purpose. Instead of the member 29 frictionally engaging the surface of the frame mem-

ber 14 it may engage the shanks of the clasp member 19 and 20 or either of them or both surfaces of the frame member and the members 19 and 20.

Figs. 8 and 9 show a form of hinge which may be called a one piece hinge. The frame 70 members 31, 32 and 33 may correspond to the frame members 12, 13 and 14 of Figs. 1 and 2. The inner member 33 has a plate portion 34 at the lower part of which the lug 35 of the frame member 32 is pivoted, as by a rivet or pin 36. The plate portion 34 may be formed integral with the intermediate member 33 or separate therefrom as preferred. At the outer portion of the plate member 34, the frame member 31 is 80 pivoted thereto by a rivet or pin 37. The action of the frame members of the metal frame of the bag is substantially the same as that already described.

In Fig. 10 the member 38 is for the shallow pocket and differs somewhat in shape from that already described. At the lower end of the frame member 38 is a lug 39 which is held to move on a pivot, pin or stud 40, forming a hinge. The two other members of the frame may be hinged together as at 41 in the manner already described.

Having thus described my invention, I claim as new and desire to secure by Let- 95 ters Patent:—

1. A hand bag comprising a frame having three arched channel members, two of said members being of substantially the same dimensions and pivotally connected together at their ends, the remaining frame member being of less height than the other members and being pivotally held to the outer side of one of said members with its upper portion in alignment with the upper portions of the other members, a pocket of flexible material having its opposite sides held within the channel portions of the two larger frame members, and a pocket of flexible material of less depth than said first-mentioned pocket having one side thereof held within the channel portion of the smaller frame member and its opposite side held within the channel portion of the adjacent frame member extending above the pivotal point of the smaller frame member.

2. A hand bag comprising a frame having three arched sheet metal channel members, two of said members being of the same height and formed with depending lugs at their lower ends pivotally held together, the remaining frame member being of less height than the other members and having depending lugs at its outer ends pivotally held to lugs stamped outwardly from the outer walls of the vertical portions of one of said larger frame members intermediate the ends thereof, a pocket of flexible mate-

5 rial having its opposite sides held within the channel portions of the larger frame members, and a second pocket of less depth than said first pocket and having its outer side held within the channel portion of the smaller frame member and its inner side held within the channel portion of the adjacent frame member above the pivotal point of the smaller frame member, and means

for locking the frame members together to close the mouths of said pockets.

This specification signed and witnessed this 24th day of March, A. D. 1915.

MORRIS NOVER.

Witnesses:

LESTER C. TAYLOR,
C. BARTELS,

UNITED STATES PATENT OFFICE.

JOHN E. GALE, OF PITTSBURGH, PENNSYLVANIA.

VALISE.

Application filed December 4, 1923, Serial No. 678,424. Renewed May 5, 1926.

This invention relates to certain new and useful improvements in valises and while primarily designed for infant's equipment, it will be obvious that the device may be employed for any purposes wherein it is found to be applicable.

Important objects of this invention are to provide a valise of the type stated, which includes a plurality of receptacle supports for carrying liquid containers in the vertical position, which permits of the removal of said supports to allow of its use for receiving any articles in the usual manner and which embodies a detachable outside pocket preferably designed for storing soiled garments.

Further objects of the invention are to provide a device of the character stated which is simple in its construction and arrangement, strong, durable and efficient in its use, sanitary, compact, attractive in appearance, and comparatively inexpensive to manufacture.

With the foregoing and other objects in view, which will appear as the description proceeds, the invention resides in the combination and arrangement of parts and in the details of construction hereinafter described and claimed, it being understood that the changes in the precise embodiment of the invention hereinafter disclosed can be made within the scope of what is claimed without departing from the spirit of the invention.

In the drawing forming a portion of this specification and wherein like numerals of reference designate corresponding parts throughout the several views:—

Figure 1 is a perspective view of a valise in accordance with my invention.

Figure 2 is a transverse cross sectional view thereof.

Figure 3 is a fragmentary view of the bottom and associated parts.

Figure 4 is a plan view of the inner side of the detachable pocket.

Referring in detail to the drawings, reference numeral 1 denotes the body portion of the valise constructed from any suitable material, preferably leather. The body portion 1 consists of an elongated rectangular bottom 2 connected with the side members 3 and 4 and the bellows end members 5'. The latter permit of the convergence of the side members 3 and 4 toward their upper ends when the valise is in the closed position, as shown in Figure 1 of the drawing.

A cover 5 is stitched, as indicated at 6, adjacent to the upper edge of the side member 4. The cover 5 is so connected to the side member 4, by the stitching 6, as to leave the marginal edge of the cover 5 free, providing thereby a flap 7. The latter is provided with a clasp socket 8 positioned adjacent to each end thereof. The cover 5 overlaps the upper edges of the side members 3 and 4 and is locked in the closed position by the engagement of the clasp sockets 9, mounted in the marginal edge of the free side of the cover 5, with corresponding clasp balls 10 mounted in the side member 3.

The valise is provided with a pair of looped strap handles 11 and 11', each having its lower ends, permanently connected to respective marginal side edges of the bottom 2, as indicated at 12. The handle 11 is detachably connected to the side member 4 slightly above the horizontal center of the latter, by means of the snap clasps 13. The handle 11' is likewise connected to the side member 3, by means of the snap clasps 14.

The body portion 1 is lined throughout by a suitable lining 15. The side member 4 carries a pocket 16 on its inner side. The pocket 16 is open at its top and may be secured in the closed position by the snap clasp 17, a portion of which is carried by a tab 18 fixed to the upper edge of the side member 4.

Positioned between the bottom 2 and the bottom lining is a flat rectangular metal bottom plate 19 of a configuration corresponding to the contour of the bottom 2. The bottom plate 19 is detachably secured in position by the snap clasps 20, one of which is positioned at each corner of the bottom. The clasp balls are carried by, and depend from, the plate 19 and the associated sockets are mounted in the bottom 2.

A plurality of receptacle holders 21 are detachably mounted on the bottom plate 19 by means of suitable snap clasps 22. The clasp balls are mounted in the plate 19 and extend through the lining 15, and the clasp socket is carried by the holder 21. The holders 21 are preferably arranged in longitudinal alignment on the bottom plate 19 and any number to best meet conditions found in practice may be used.

Each of the holders 21 consists of four vertically disposed resilient fingers which are connected at their lower ends by the clasp socket of the clasp 22, as clearly shown in Figure 3 of the drawing. Each of the hold-

ers 21 is designed for supporting a bottle 23 in the vertical position so that the contents of the latter will not be liable to be split therefrom.

5 An independent pocket 24, preferably constructed of waterproof material and open at its top, is detachably secured by means of snap clasps 25, to the inner face of a panel 26. The pocket 24 is adapted to receive soiled 10 apparel, of any nature, which would be objectionable to place within the valise.

For securing the panel 26 and the pocket 24 to the body portion 1, the panel 26 is provided with a snap clasp ball 27 at each upper 15 corner adapted to engage the respective snap clasp sockets 8 mounted in the flap 7. The panel 26 is further provided with a pair of snap clasp balls 28 which are positioned to be engaged by the snap clasp sockets 13 20 mounted in the handle 11, whereby the panel 26 and associated pocket 24 will be compactly held in position against the side member 4 of the body portion. An identical pocket 24 may be held to the opposite side 25 of the bag by means of snaps 10 and 14 on the side 3, and by the socket 9 on cover flap 5. It will be noted that the holders 21 may be readily removed from the plate 19, thereby permitting of the use of the valise for the 30 reception of any articles in the usual manner.

What I claim is:—

1. In a valise the combination of a body member, a separate removable pocket member arranged to lie against one side of the 35 body member, a handle attached adjacent the bottom of the body member and arranged to extend upwardly thereof, mutually engageable fastening means on the pocket and on the handle, and fastening means on the body 40 member arranged to engage the fastening means on the handle when the pocket is removed.

2. In a valise the combination of a body member, a cover on the body member and 45 having a flap arranged to overlie the open end of the body member, a separate removable pocket member arranged to lie against one side of the body member, mutually engageable fastening means on the flap and on 50 the pocket, and fastening means on the body member arranged to engage the fastening means on the flap when the pocket is removed.

3. In a valise the combination of a body 55 member, a cover secured to one side of the body member adjacent the open end thereof, said cover having a flap arranged to serve as a closure for the body member and a false flap on the opposite side of the body mem- 60 ber, separate removable pockets arranged to lie against the opposite sides of the body member, fastening means on both sides of the body member, fastening means on both 65 pockets, and fastening means on both flaps arranged to engage either the fastening

means on such side of the body member or the fastening means on the pockets.

4. In a valise the combination of a body member, a cover on the body member having 70 a flap arranged to overlie the open end of the body member, a separate removable pocket member arranged to lie against one side of the body member, mutually engageable fastening means on the flap and on the 75 pocket, fastening means on the body member arranged to engage the fastening means on the flap when the pocket is removed, a handle attached adjacent the bottom of the 80 body member and arranged to extend upwardly thereof, and mutually engageable fastening means on the pocket and on the handle.

5. In a valise the combination of a body member, a cover on the body member having 85 a flap arranged to overlie the open end of the body member, a separate removable pocket member arranged to lie against one side of the body member, mutually engageable fastening means on the flap and on the 90 pocket, fastening means on the body member arranged to engage the fastening means on the flap when the pocket is removed, a handle attached adjacent the bottom of the 95 body member and arranged to extend upwardly thereof, mutually engageable fastening means on the pocket and on the handle, and fastening means on the body member arranged to engage the fastening means on 100 the handle with the pocket removed.

6. In a valise the combination of a body member, a cover attached to one side of the 105 body member and adjacent the open end thereof, said cover having a flap arranged to serve as a closure for the body member and a false flap on the opposite side of the body 110 member, separate removable pockets arranged to lie against the opposite sides of the body member, fastening means on both sides of the body member, fastening means 115 on both pockets, fastening means on both flaps arranged to engage either the fastening means on such side of the body member or the fastening means on the pockets, handle members attached adjacent the bot- 120 tom of the body member and arranged to extend upwardly thereof, and mutually engageable fastening means on both pockets and on both handles.

7. In a valise the combination of a body 125 member, a cover attached to one side of the body member and adjacent the open end thereof, said cover having a flap arranged to serve as a closure for the body member and a false flap on the opposite side of the 130 body member, separate removable pockets arranged to lie against the opposite sides of the body member, fastening means on both sides of the body member, fastening means on both pockets, handle member attached 135 adjacent the bottom of the body member

and arranged to extend upwardly thereof, the bottom of the body member and arranged to extend upwardly thereof, mutually engageable fastening means on both pockets and on both handles, and fastening means on the body member arranged to engage the fastening means on the handles when the pockets are removed.

8. In a valise the combination of a body member, a false flap adjacent the open end of the body member, a separate removable pocket member arranged to lie against one side of the body member, mutually engageable fastening means on the false flap and on the pocket, and fastening means on the body member arranged to engage the fastening means on the flap when the pocket is removed.

9. In a valise the combination of a body member, a false flap adjacent the open end of the body member, a separate removable pocket member arranged to lie against one side of the body member, mutually engageable fastening means on the false flap and on the pocket member,

In testimony whereof I affix my signature.
JOHN E. GALE.

Dec. 24, 1935.

A. HALPIN
PORTABLE RECEP-TACLE
Filed June 11, 1935

2,025,101

Fig. 1

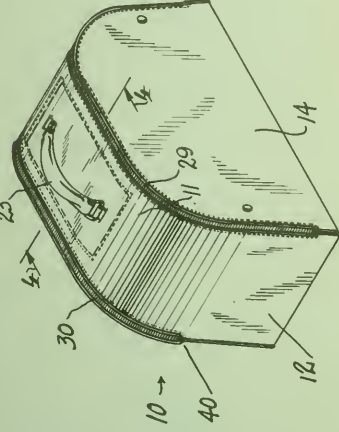


Fig. 2

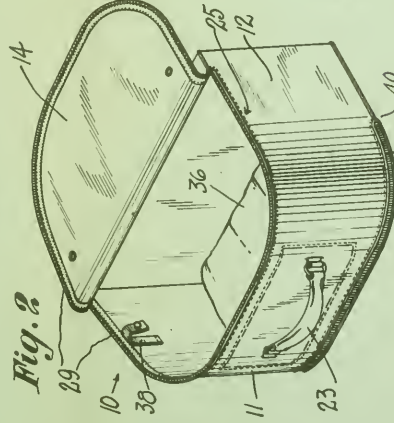


Fig. 3

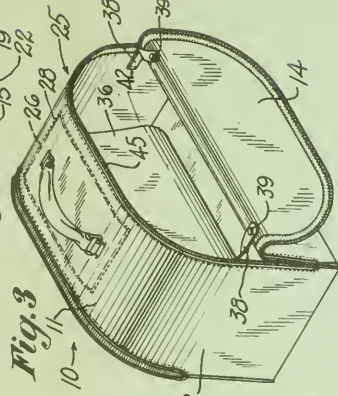


Fig. 5

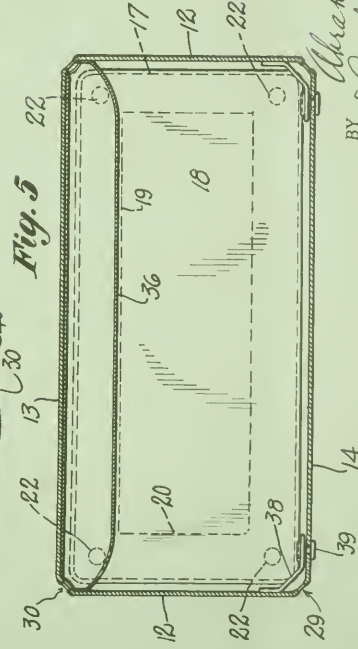
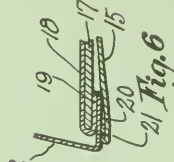


Fig. 6



INVENTOR.

BY *Abraham Halpin*
Min Shumacher
ATTORNEY.

UNITED STATES PATENT OFFICE

2,025,101

PORTABLE RECEPTACLE

Abraham Halpin, New York, N. Y.

Application June 11, 1935, Serial No. 25,977

3 Claims. (Cl. 190—41)

This invention relates to portable receptacles and has among its objects the provision of an improved device of the character described adapted for particularly advantageous and convenient use as a traveling bag, and whereby packing and removal of articles is facilitated.

Another object of the invention is the provision of a device of the type mentioned having relatively few and simple parts so arranged and constructed as to require a minimum of time, labor and material in manufacture.

A further object of the invention is to furnish a device of the type mentioned characterized by a rigid bottom wall and an otherwise wholly pliable bag body, together with yieldable but sufficiently stiff reinforcing means to maintain the body in shape and to facilitate an even distribution of the stress exerted by a handle connected to the body for carrying the device, and so as to prevent the pliable body from distorting or relatively collapsing under the stress of the handle.

A further object of the invention is to construct a device of the class alluded to having a main compartment, and an auxiliary compartment therein, both compartments independently accessible through individual openings remote from each other, whereby different types of articles intended for different uses or at different times may be handled separately, and the device being highly compact, durable, neat and efficient in use.

Other objects and advantages of the invention will become apparent as the specification proceeds.

With the aforesaid objects in view, the invention consists in the novel combinations and arrangements of parts hereinafter described in their preferred embodiments, pointed out in the subjoined claims, and illustrated in the annexed drawing, wherein like parts are designated by the same reference characters throughout the several views.

In the drawing:

Figure 1 is an isometric perspective view showing a closed device embodying the invention.

Fig. 2 is a similar view of the open device lying on a side to facilitate packing, by reason of the arrangement of the device.

Fig. 3 is a similar view of the device in upright position and maintained only partially open to retain articles in the lower part of the bag.

Fig. 4 is an enlarged vertical sectional view taken on the transverse line 4—4 of Fig. 1.

Fig. 5 is a horizontal sectional diagrammatic view taken on the line 5—5 of Fig. 4.

Fig. 6 is a fragmentary diagrammatic sectional view taken on the line 6—6 of Fig. 4.

The advantages of the invention as here outlined are best realized when all of its features and instrumentalities are combined in one and the same structure, but, useful devices may be produced embodying less than the whole.

It will be obvious to those skilled in the art to which the invention appertains, that the same may be incorporated in several different constructions. The accompanying drawing, therefore, is submitted merely as showing the preferred exemplification of the invention.

Referring in detail to the drawing, 10 denotes a device embodying the invention. The same may reside in a portable receptacle having a bag comprising top and end walls 11, 12, respectively, consisting preferably of a single strip of pliable or flexible material, such as leather, composition or textile fabric.

The bag 10 may include a plurality of side walls 13, 14 likewise preferably consisting of a single strip or sheet of a material similar to that of the walls 11 and 12, and comprising a bottom portion or layer 15.

The bag 10 may have a bottom wall 16 stiffened or reinforced throughout so as to be rigid, and may comprise rigid material for this purpose. For example, the bottom wall may include a reinforcing slab or panel 17 of wood or composition, extending substantially throughout the bottom. This slab, if desired, may be covered by a sheet of textile fabric 18 infolded as at 19 around the ends and sides of the slab.

Underlying the end portions of the slab or panel 17, the end walls 12 may have portions 20 infolded for securing.

The layer 15 may underlie the panel 17 and the portions 20 and may be secured thereto by continuous transverse lines of stitching 21 at the ends of the bag. Rivets 22 may interconnect the panels and the parts 15 and 22 at the corners of the bag, and may afford heads to support the bag on the ground.

It is thus seen that the bag consists in the main of two pieces of material. One piece provides the top and end walls 11 and 12 and is longitudinally curved or arched over the bottom. The other piece provides the side walls 13, 14 and the finishing bottom layer 15 and extending under the bottom, being concaved upward and transversely thereof in contradistinction to the top and end walls. The stiffening means 17 lies preferably within the bag to afford a neat external finish. The various top, side and end walls

may be suitably interconnected, affording a bag that can be constructed with the least cutting, fitting, sewing or other fabrication of parts and having a high degree of strength.

A handle 23 may be suitably connected as at 24 to the top wall 11. To prevent longitudinal and transverse collapse or distortion of the top wall by the pull exerted thereon by the handle in carrying the bag, suitable reinforcing means may be provided as will now be described.

The reinforcements referred to include longitudinal strip means 25 extending continuously along and secured to the top and end walls 11, 12 and in close proximity to the side walls 13, 14, down to the bottom wall of the bag and substantially to the anchorage at the rivets 22. A reinforcement 26, consisting of a slab 26 of wood or the like may underlie the top wall and may be covered by a piece of fabric 21 stitched to the top wall by a line of stitching 28 extending continuously around the reinforcement 26. The latter may have side edges lying in relative proximity to the reinforcements 25. Since the means 24 is connected to the slab 26, the pull of the handle is equalized over the top wall and directly transmitted to the reinforcements 25 which act like cables to carry the bottom wall. The curved path of these cable like reinforcements is maintained by the side walls 13, 14 which continuously suspend the bottom wall and act as a uniform suspension means. Thus the shape of the pliable bag body is maintained.

If desired, one or more slide fasteners 29, 30 may be provided between portions of the top and end walls, and the side walls. Due to the proximity of the reinforcements 25, the latter are combined with the slide fasteners in unitary constructions. Preferably strip reinforcement means such as 31, 31a are also provided along the edges of the side walls on the opposite sides of the slide fasteners relative to the reinforcements 25.

The reinforcements 25 and 31, 31a may all be of duplicate construction and hence any one may be described. Each of the two series of hooks indicated at 32 may be connected to a stringer strip 33. A longitudinally folded strip of strong flexible material 34 may lie between the stringer and the adjacent infolded edge of the adjoining wall of the receptacle. A plurality of lines of stitching 35 may continuously interconnect the side wall with the strip 34 and the stringer 33 by passing therethrough. At the slide fastener 30, a pouch 36 may be provided operable by the slide fastener and suspended within the bag from the reinforcements 25 and 31a as by having edge portions 31 of the pouch continuously inserted into the corresponding reinforcements 25 and 31a and secured therein by the stitching 35. Details of the pouch will be later described.

It is noted that the slide fastener 29 extends substantially down to the bottom wall 16 of the bag. This permits the bag to be placed on a side as shown in Fig. 2 and opened wide with the wall 14 constituting a flap. Thus the bag may be packed with great convenience. If it should be desired to open the bag in upright position to remove an article without dumping the contents in the lower part of the bag, auxiliary holding means to limit the opening without affecting the freedom of the slide fastener may be provided. For example, short straps or tabs 38 may be affixed to the end walls 12 of the bag within the same and may have detachable or snap fastener engagement as at 39 with the side wall 14 intermediate

the upper and lower ends thereof. If the flap or side wall 14 is now opened, regardless of the degree of opening of the slide fastener, the lower portion of said side wall remains closed to retain the contents in the lower part of the bag.

The slide fastener 30 extends only substantially midway down the side wall 13 and terminates at 40. This slide fastener controls the pouch 36 which consists of a thin limp fabric or rubber and is closed at the bottom 41 and at the lower portion of its ends as at 42. The upper portions of its ends as well as its upper edges are secured along opposite edges of the slide fastener and the pouch is thus sustained, principally by the adjacent reinforcement 25. The pouch 36 may receive articles such as shoes, a wet bathing suit, and the like.

It will be seen that this device lends itself to rapid and simple manufacture, as the reinforcements mentioned can be quickly attached, and the bag then assembled.

The manner of using the invention will now be briefly described. Miscellaneous articles can be packed into the pouch 36, and are readily accessible on opening and closing the slide fastener 25 without disturbing the contents of the main bag compartment. The latter may be packed and used as shown in Fig. 2, and articles in the limp pouch 36 can be distributed to suit the packing, and a desired article removed or inserted in the position shown in Fig. 3. When packed, the handbag maintains its shape, and will not lose its form by stretching, distortion or the like.

If desired, the slide fastener 29 may comprise two slide fasteners, each beginning at 40 and 35 terminating at a midpoint 45, indicated in Fig. 3. In this manner the slide fasteners can be opened downward to any desired degree at both ends so that the straps 38 may be eliminated. Of course a single slide fastener is cheaper, and 40 straps 38 afford positive action.

It will be appreciated that various changes and modifications may be made in the device as shown in the drawing, and that the same is submitted in an illustrative and not in a limiting sense, the scope of the invention being defined in the following claims.

I claim:

1. A portable receptacle including a bottom wall of rigid material, top and side walls consisting of pliable material, the top wall being in the shape of an arc of large radius, reinforcements extending continuously along the meeting lines between the top and side walls and between the end and side walls and being secured to the bottom wall, a slide fastener extending continuously between one side wall and the top and end walls, a handle, and a stress distributing plate of rigid material connected to the handle and extending along the top wall and being fixed to the latter in proximity to said reinforcements.

2. A portable receptacle including a bag having a sheet of material providing a bottom wall and side walls extending upward therefrom, a second sheet of material providing a top wall and end walls downwardly extending therefrom, the top, side, end and bottom walls being interconnected, and the connection between the top and end walls and at least one side wall being releasable to constitute the said side wall, an operable closure means for the bag, a stiffening means for the bottom wall, reinforcement strips extending along the lines of connection between the side walls and the top and end walls, a sup-

porting handle connected to the top wall, and means connecting the handle to the top wall in relative proximity to and between the reinforcements to cause the stress exerted by the handle on the top wall in lifting the bag to be communicated by the reinforcements downward toward the region of the bottom wall.

3. A portable receptacle including an elongated normally upright bag having a downwardly openable pliable side wall to permit the bag to

be packed when lying in a horizontal position, a slide fastener closure for said side wall, and releasable attaching means independent of the slide closure and located at the ends of the said side wall in spaced relation to the remote ends of the slide fastener for limiting the degree of opening of the side wall regardless of whether the slide fastener is fully open.

ABRAHAM HALPIN. 10

Sept. 9, 1947.

M. SHANZER

Des. 147,477

COMBINED BOTTLE AND DIAPER UTILITY BAG

Filed Sept. 17, 1946

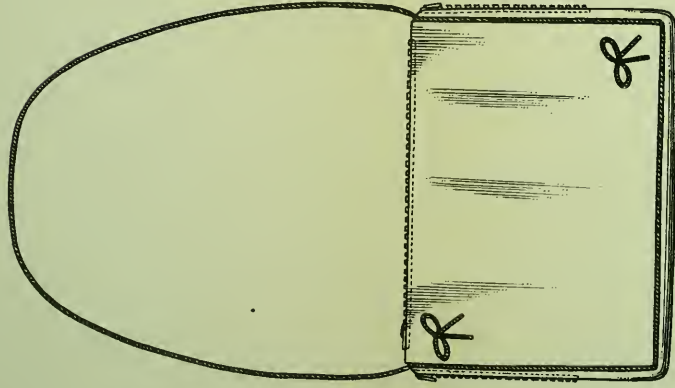


Fig. 1-



Fig. 2-

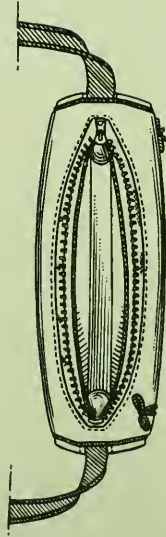


Fig. 3 -

MAX SHANZER,
INVENTOR.

BY

Wm. G. Riegan,

ATTORNEY

UNITED STATES PATENT OFFICE

147,477

DESIGN FOR A COMBINED BOTTLE AND
DIAPER UTILITY BAG

Max Shanzer, New York, N. Y.

Application September 17, 1946, Serial No. 133,366

Term of patent 14 years

(Cl. D87—3)

To all whom it may concern:

Be it known that I, Max Shanzer, a citizen of the United States of America, residing in New York city, county of New York, and State of New York, have invented a new, original, and ornamental Design for a Combined Bottle and Diaper Utility Bag, of which the following is a specification, reference being had to the accompanying drawing, forming part thereof, wherein

Figure 1 is a front elevational view of a combined bottle and diaper utility bag showing my new design in closed position.

Figure 2 is an end elevational view showing the slide fastener portion of the right-hand bottle compartment in open position.

Figure 3 is a top plan view of the combined bottle and diaper utility bag, with a portion of the handle omitted for convenience of illustration, and showing the slide fastener portion of the diaper compartment in open position.

The circular elements visible at either end of the slide fastener opening in Figure 3, represent the wall portions of the bottle compartments.

The rear and opposite end of the article, not shown, are substantially the same in appearance as the front and end disclosed, except for the omission of the bow ornamentations in the rear. I claim:

The ornamental design for a combined bottle and diaper utility bag, substantially as shown and described.

MAX SHANZER.

REFERENCES CITED

The following references are of record in the file of this patent:

UNITED STATES PATENTS

Number	Name	Date
D. 135,530	Rubin	Apr. 20, 1943

OTHER REFERENCES

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New York Times clipping, October 15, 1944, Milgrim adv., "Rain or Shine."



No. 14800

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANCES P. SYRACUSE and NEW WONDER BAG CORPORATION,

Appellants,

vs.

HARRY PARIS, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

FILED

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DEC 21 1955

PAUL P. O'BRIEN, CLERK

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APPELLANTS' REPLY BRIEF.

On the first page of Appellee's Brief the attention of this Honorable Court is directed to the so-called technical error of the appellee's counsel and the lower court in proceeding to summary judgment on the defendant's motion therefor, in view of the fact that the patent in suit is not in the Transcript of Record, and for the record counsel for appellee contends that appellants' appeal should be arbitrarily dismissed in favor of the appellee, in view of said technical error of the appellee's counsel.

The position of the defendant's counsel, as to the legal effect of his self-serving declaration "that the patent in suit is not in the transcript of Record," is without merit and is untenable and particularly in this suit in *equity*. The motion for summary judgment was the motion of

counsel for defendant, and he is responsible for it and for any damage suffered by plaintiffs by reason of the defendant's attorney's gumming up of the case by proceeding with his grossly irregular motion, which necessitated the prosecution of this appeal by appellants. The suggestion of counsel for appellee that this Court, if it desired to be technical, could dismiss appellants' meritorious appeal on the sole ground that he does not find the patent in suit in the Transcript of Record, flies directly in the face of the Transcript of Record, Certificate of Clerk, page 31, as follows:

“Defendant's Counter Designation of Additional Contents of Record;

which, together with the Deposition of Frances P. Syracuse, taken on July 28, 1954, at Los Angeles, California, deft's exhibit C; *File wrapper and contents of patent in suit*; all in said cause, constitute the *transcript of record on appeal* to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amounted to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 28th day of June, 1955.

[Seal]

JOHN A. CHILDRESS,

Clerk.

By /s/ CHARLES E. JONES,
Deputy.”

The said Transcript of Record and appeal are endorsed and Filed June 29, 1955, by

“/s/ PAUL P. O'BRIEN,
*Clerk of the United States Court of Appeals
for the Ninth Circuit.”*

In a letter addressed to the Clerk of the United States District Court, Southern District of California, Central Division, dated June 27, 1955, by counsel for defendant, said counsel filed therewith "*Ex. B. File wrapper and contents of the patent in suit.*" No copy of said letter and file wrapper were served on counsel for appellants, to his knowledge, but said letter appears in the file of the case with the United States District Court Clerk of this district.

The file wrapper and contents of the patent in suit generally contains a *certified copy of said patent*, and it should be in said file wrapper and contents, which the Clerk of the District Court has certified, and constitutes a part of the Transcript of Record on appeal to this Court. However, appellants' attorney has a certified copy of the file wrapper and contents of the patent in suit, including said patent, and, if necessary, will offer it in evidence, *nunc pro tunc*, at the hearing of this appeal, so that this Court may consider the motion for summary judgment in the District Court as a trial, and hear this appeal on the full merits of the case.

Moreover, it should not be overlooked by this Honorable Court that the jurisdiction of the United States District Court is admitted by the defendant Harry Paris, by his motion for summary judgment, and is admitted by said District Court by its Findings of Fact and Conclusions of Law, and by the Summary Judgment of said Court. (See Appellants' Op. Br. pp. 1-2.)

There is something mysterious about the patent in suit, in view of the fact that it disappeared under rather suspicious circumstances. When this suit was brought, the plaintiff, appellant Frances P. Syracuse, had her original Letters Patent in suit No. 2,533,850, and she gave it to

her attorney, at that time, Robert E. Geauge. Counsel for defendant, however, borrowed said letters patent from Mr. Geauge, but has never returned it, and plaintiffs' present counsel has never been able to obtain it, although he has tried to do so, and the defendant's counsel, if he is to be believed, presented his motion for summary judgment to the Court and obtained said judgment without knowing, and without the Court knowing, that the patent in suit was not before the Court. It is incredible that the District Judge could consider the defendant's motion seriously on its merits and judge the same without knowing what he was judging. The position of the defendant's counsel that, because he muffed his motion for summary judgment, by leaving out of his motion the subject matter of the litigation, this Honorable Court should nevertheless dismiss the appellants' appeal, is a *reductio ad absurdum*, and leaves this Honorable Court with no alternative other than to reverse the summary judgment of the District Court for irregularity, and adjudicate the patent in suit valid and infringed by the defendant, and order an accounting of damages against the defendant in favor of the plaintiffs for such infringement. Defendant has had his day in court so far as the lower court is concerned.

The summary of the prior art patents by defendant's counsel on page 9 of his brief, to the effect that everything in the claim of the patent in suit is old in handbags, is no bar to patentability of the *new combination of old elements of the patent in suit, which performs a new and useful function and accomplishes a new and useful result.*

Loom Co. v. Higgins, 105 U. S. 591.

“A *combination* is a union of elements which may be partly old and partly new, or wholly old or wholly new. But whether new or old, the combination is a means—an invention—distinct from them (the elements) . . . In making the combination an inventor has the whole field of mechanics to draw from.”

Leeds & Catlin v. Victor Talking Machine Co.,
213 U. S. 318, quoted in *Diamond Rubber Co.*
v. Consol. Tire Co., 220 U. S. 428.

Patent Office Cited Best Art.

The contention of counsel for defendant that the examiner in the Patent Office overlooked any pertinent art in his examination of the application for the patent in suit, is without merit and certainly farfetched. In fact, the additional patents set up by the defendant in his Amended Answer are not so close to the patent in suit as the prior art patents cited by the Patent Office against the application for the patent in suit, and particularly the patent of Holland, No. 2,447,940, which was cited by the Patent Office in the prosecution of the application for the patent in suit. *The presumption is against the contention of the defendant's counsel that the Patent Office did not cite the most pertinent prior art against the application for the patent in suit.*

“The presumption is that the officials of the Patent Office did their duty, and considered other patents *now brought forward as new prior art*. There is no evidence *dehors* these patents, nor is there anything in the patents themselves which in my judgment should overthrow the presumption.”

The Detroit Motor Appliance Co. v. Burk, 4 F.
2d 118.

See also:

Adler Sign Letter Co. et al. v. Wagner Sign Service, Inc., 112 F. 2d 264 (citing above *Detroit Motor Appliance v. Burk, supra*, Appellants' Op. Br. p. 26).

The prior art which the defendant's attorney alleges was overlooked by the Patent Office examiner in his examination of the application for the patent in suit, consists of five patents contained within a folder marked Defendant's Exhibit "C", which additional prior art was found in an *unofficial* search in the Patent Office by a Washington associate attorney employed by counsel for defendant, and there is no showing whatever that said Washington associate was any better qualified to determine the novelty of an invention than any examiner in the Patent Office who is particularly experienced in the class of inventions which he is employed to examine, and the *presumption of novelty and validity of the patent* in suit is certainly not overthrown by the additional prior art patents found in an *unofficial* search by an outside Washington associate attorney.

Appellee's Inadequate Proof.

The defense of invalidity of the patent in suit rests, in the last analysis, solely on the uncorroborated affidavit of the defendant's counsel, C. G. Stratton [Tr. pp. 12-13], which *affidavit was insufficient to overthrow the strong presumption of validity* of the patent in suit and to prove invalidity of said patent *beyond a reasonable doubt* according to the applicable rule of evidence.

Walker on Patents (Deller's Ed.), Vol. One, Sec. 63.

Invention.

The crude attempt of counsel for defendant to negative the novelty, invention and patentability of the patent in suit, on additional prior art found on an *unofficial* investigation, which additional art is nothing more than *cumulative* art, is without merit, in view of the fact that said prior art fails to disclose the *inventive concept of the invention of the patent in suit*, to wit: a *narrow hand bag for mothers and nurses of infants*, in which two longitudinal vertical diaper compartments are formed in the bag, which compartments are divided by a longitudinal waterproof partition there between, and a pair of *end nursing bottle compartments* at the *ends, respectively*, of said diaper compartments, divided from said diaper compartments by waterproof partitions, which diaper compartments and bottle compartments are *detachably closed*, by detachable *slide fasteners*, or *zippers*, respectively, *opening at the outside of said compartments*, so that *any one of said compartments may be opened to provide access thereto without opening any other of said compartments*, thus providing a *narrow, compact and not bulky handbag, which may be conveniently and easily carried by a mother or a nurse while carrying an infant, and which handbag may be very easily operated to open any one of the diaper compartments or bottle compartments, respectively, without opening any of said other compartment, and which bag is neat and attractive in appearance, which inventive concept of the patent in suit is responsible for the unusual sales and commercial success of the appellants' nursing hand bag, which has displaced on the market all other handbags of the prior art, which, so far as appellants know, are not on the market and have not been commercially successful, and there is no proof otherwise to the contrary.*

The prior art patents which were not cited by the Patent Office have been considered on pages 22-25 of Appellants' Opening Brief, and counsel for appellants sees no reason for changing his analysis and opinion of said prior art patents, after reading Appellee's Brief, other than to emphasize his opinion that the *Patent Office cited the best art* against the application for the patent in suit, *which art* cited by the Patent Office *is more pertinent* to the patent in suit than any of the prior art patents found by counsel for appellee in an *unofficial* search of the Patent Office, which last named patents the Patent Office did not cite against the patent in suit and are incorrectly alleged by counsel for defendant to have been overlooked by the Patent Office.

Brief comment, however, will be made on said prior art patents which counsel for defendant alleges are more pertinent to the patent in suit than the patents cited by the Patent Office, and which first named patents counsel for defendant alleges were *overlooked* by the Patent Office. The self-serving declaration of counsel for defendant (appellee) that the Patent Office overlooked the best art in examining the patent in suit is uncorroborated by any *expert witness under oath*.

The Shanzer design patent, Des. 147,477 is *falsely assumed by counsel for defendant to be identical* to the patent in suit, but it will be noted that the Shanzer patent has only *one* diaper compartment with *one* zipper extending longitudinally of the bag, as shown in Figure 3 of the Shanzer patent drawing, while the handbag of the patent in suit has *two longitudinally diaper compartments 33 and 34 divided by a waterproof partition 32* (Fig. 2 of patent drawing) which compartments are detachably closed at their upper sides by *two* zippers 23 and 24, re-

spectively. (Figs. 1, 2 and 4 of patent drawing.) Compartment 33 (Fig. 2) may contain *clean* diapers and the other compartment 34 may contain *damp, soiled diapers*, and the *waterproof partition* 32 (Fig. 2) prevents the *damp, soiled diapers* in compartment 33 *from soiling the clean diapers* in the compartment 34. In the Shanzer patent with only *one* diaper compartment there is *no moisture proof partition* between *two diaper compartments* to *prevent soiling of clean diapers by damp, soiled diapers*. The handbag of the patent in suit, in protecting the clean diapers from being soiled by the soiled diapers, *performs a new and useful mechanical function* which *cannot be performed by the Shanzer design patent*, and the *patent in suit thus has an expanded utility* which the Shanzer *design* patent does not have. The Shanzer patent *does not perform the mechanical function* of the patent in suit, and consequently, the Shanzer *design* patent is no anticipation of the *mechanical* patent in suit. The owner of the Shanzer patent handbag does not manufacture said Shanzer handbag, but like the defendant Harry Paris in this suit, said owner of said Shanzer patent manufactures the plaintiffs' patent handbag, without license of plaintiffs and infringes the plaintiffs' patent while this suit is pending. It is the contemptible practice of wilful infringers like the defendant herein to extol the virtues of the prior art, without using the prior art, while using and infringing the plaintiffs' patent.

Exhibit X.

The argument of defendant's counsel that Plaintiffs' Exhibit X (handbag) was introduced to show that the Shanzer patent is invalid, is an attempted distortion of the purpose and significance of said exhibit by counsel for defendant. Said Exhibit X shows a handbag of sub-

stantially the *same shape and design* as the Shanzer handbag with a *single* compartment and zipper extending *longitudinally of the upper side of the bag*, and *end* zippers extending downwardly from the upper side in the ends, respectively, of the bag, substantially in the same manner as in the Shanzer patent. In other words, said Exhibit X anticipates every *design feature* of the Shanzer patent, except the two bows at diagonal corners of the bag, *which bows are not included in and are no part of the handbag of the patent in suit*. Every *design feature* of the Shanzer bag which may correspond to design features of the patent in suit, were included in Plaintiffs' Exhibit X about *ten years before the application for the Shanzer patent* was filed, and consequently said *corresponding design features in the Shanzer patent and the patent in suit were in the public domain* long before the applications for the Shanzer patent and the patent in suit were filed. To set up the Shanzer patent as an anticipation of common *design features* in said Shanzer patent and the patent in suit *when said design features were in the public domain is a reductio ad absurdum*. On the other hand to set up the Shanzer patent as an anticipation of the *mechanical function* of the patent in suit of the means in said patent to prevent soiled diapers in one compartment from contacting and soiling clean diapers in another compartment, is another *reductio ad absurdum* in view of the fact that the *Shanzer patent has no means or two separate diaper compartments to prevent soiled diapers in one compartment from contacting and soiling clean diapers in another compartment*. The fact that the *common design features of both the Shanzer patent and the patent in suit were in the public domain*, and the fact that the *mechanical function* of the patent in suit of the mechanical means, to wit: the diaper compartments and

the moisture proof partition there between, for preventing contract with and soiling of the clean diapers by the damp, soiled diapers, are not included in and are not part of the Shanzer patent, *eliminates said Shanzer patent as a valid prior art reference against, and as an anticipation of the patent in suit.* Said Shanzer patent consequently, *should be disregarded as prior art altogether against the patent in suit,* despite the false assertion of counsel for defendant that the Shanzer patent is probably the *closest prior patent* to the patent in suit and was overlooked by the Patent Office in the examination of the application of the patent in suit. Moreover, the additional assertion of counsel for defendant that, in view of said irrelevant Shanzer patent, “the *prima facie* presumption of validity of the patent in suit is believed to be entirely gone,” *is another reductio ad absurdum* of counsel for defendant. There are obviously a number of screws loose in the logic of the argument of counsel for the defendant. The fact that the common *design features* of the Shanzer patent and the patent in suit, *which are the only common features* of said two patents, were in the *public domain* when the application for the patent in suit was filed, in view of Plaintiffs’ Exhibit X, gave the appellant-patentee, Frances P. Syracuse, the right to include said common design features in the *new combination* claim of the patent in suit, since an applicant for patent has a right to claim a *new combination of old elements.*

*Leeds & Cattlin v. Victor Talking Mach. Co.,
supra.*

The citation of authorities by the defendant’s counsel that a *design* patent may anticipate a *mechanical* patent, are not in point, in this case, in view of the fact that

the Shanzer patent does not show the *two* zippers for the two adjacent diaper compartments and the moisture-proof partition between said compartments for the purpose described.

“Of course anticipation of a *mechanical patent* is not established by a *design patent which does not disclose the structure* of the mechanical patent.”

Electro Mfg. Co. v. Yellin (C. C. A. 7), 56 U. S. P. Q. 290, 292, 132 F. 2d 979.

As for the remaining patents found in an *unofficial* search and offered by the defendant's counsel, which he has alleged were overlooked by the Patent Office, contrary to legal presumption, it will be noted that not one of said remaining patents shows a *narrow bag with two zipper-closed laterally-spaced diaper compartments*, and *two zipper-closed end bottle compartments at the ends respectively* of said bag, as in the patent in suit. Moreover, the Gale patent No. 1,617,629, Halpin patent No. 2,025,101 and the Vasquez patent No. 2,429,856 are entirely *too wide and too bulky* for a handbag of the type of appellant's handbag, which has to be carried by a mother or nurse while carrying an infant which has to be nursed by using appellants' handbag.

We are not aware, and there is no evidence that any of the bags of the prior art were ever used, or used as a *portable infant's nursing bag* like appellants' nursing bag, the commercial success of which was immediate when it appeared on the market and displaced other handbags used for the same purpose as appellants' patented bag, which facts appellants are prepared to prove.

Summary Judgment on Facts Without Trial Is Irregular and Invalid.

The statement on page 12 of Appellee's Brief that "*No disputed issues of fact were raised by said affidavits,*" on motion for summary judgment is rather extraordinary in view of the obvious fact that said motion was based on the defense of *alleged anticipation by the prior art* of the patent in suit.

"Anticipation by the prior art is a question of fact. Thompson Spot Welder Co. v. Ford Motor Car Co., 265 U. S. 445, 44 S. Ct. 533, 68 L. Ed. 1098; Reinharts Inc. v. Catapillar Tractor Co., 9 Cir., 85 F. 2d 628, certiorari denied 302 U. S. 694, 58 S. Ct. 13, 82 L. Ed. 536."

Counsel for defendant misconstrue the case of *Hycon Mfg. Co. v. H. Koch & Sons* (C. A. 9), 104 U.S. P. Q. 231, as applied to the present case by the Court of Appeals of this circuit as follows:

"The trial court exceeded the permissible limits of determination of disputed facts, questions without trial. . . . An indispensable prerequisite to such a summary judgment, is the absence of a material fact."

The authorities cited by counsel for defendant on pages 4, 5 and 10 of Appellee's Brief are not in point. The case of *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719, is an old case which has not been followed by later cases. The ruling in said case erroneously treated the patent for a pencil with a rubber on one end of the pencil as a *machine* in which the elements of the machine co-act according to the inherent rule of action of the machine, but said patent for the pencil and rubber for erasing was

not a patent for a machine, but was a patent for an *article of manufacture*, like the patent in suit for a nursing handbag, which has no inherent rule of action of its own, but requires the application of external force to govern its operation and utility.

The validity of the patent in suit comes clearly within the following definition of Amdur, Patent Law and Practice, page 15, Section 16:

“A manufacture or article of manufacture is an assemblage of parts (or a single homogeneous unit) *passively* useful in reaching a beneficial result. It differs from a machine in having no inherent law of operation.”

Examples of articles of manufacture are wooden pavements, collar buttons, barbed wire, railway brake shoes and belt for driving machinery.

In *Toledo Computing Scale v. Moneyweight Scale Co.*, 178 Fed. 557 at 563, the Court held:

“*It is significant that very few combinations of old devices* have been held void for aggregation. The fact that this machine was the first to be commercially successful should also have some favorable influence on the matter of construction.”

The case of *Bankers Utility Co. v. Pacific Nat'l Bank*, 18 F. 2d 16 at 18, the Court (C. C. A. 9) held:

“In their position plaintiffs are fortified by the presumptions attending a patent (*Wilson & Willard Mfg. Co. v. Bole Bole* (C. C. A.), 227 F. 607; *San Francisco C. Co. v. Beyrle* (C. C. A.), 195 F. 516) and by the fact that their device is a commercial success and has brought on imitation (*Application of Me-Clair* (D. C.), 16 F. (2d) 351; *Sandusky v. Brooklyn Box Toe Co.* (D. C.), 13 F. (2d) 241;

Carson v. Am. Smelting Co. (C. C. A.), 4 F. (2d) 463; Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co. (D. C.), 295 F. 748, etc.).”

“The term ‘manufacture,’ as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, *not being a machine, a composition of matter, or a design.*”

Walker on Patents (Deller’s Ed.), Vol. One, p. 52, Sec. 13.

Infringement.

Counsel for appellee has asserted that the claim of the patent in suit is an unduly narrow claim, which the appellee’s handbag does not infringe, but the scope of the claim is immaterial when the infringer has copied said claim closely, which the appellee has done in the case at bar. A comparison of the defendant’s handbag, Plaintiffs’ Exhibit “B” for identification, Deposition of Appellee Harry Paris, pages 10, 13 and 55, with the claim of the patent in suit, shows that said claim reads, element for element upon the elements, respectively, of appellee’s handbag. Moreover, said appellee’s handbag, Plaintiffs’ Exhibit “B” for identification, is a “Chinese” copy of appellants’ handbag, Plaintiffs’ Exhibit “A” for identification, Deposition of Harry Paris, pages 3, 8 and 9. Appellants have clearly proved a clear case of infringement of their patent in suit against the appellee.

On page 11 of Appellee’s Brief the appellee is described as a small, impecunious business man who has been unduly oppressed by the appellants with the present litigation, but we have a financial report of Dun & Bradstreet, Inc. on the appellee, Harry Paris, which shows that

said appellee's net sales of appellants' patented handbag during the year 1952 amounted to \$100,000, with a net profit of \$20,000. Said net sales of \$100,000 included sales to Sears, Roebuck stores of appellants' patented handbag, which sales appellants should have under protection of their patent in suit. Appellee during the years 1954 and 1955 bought two houses valued at \$32,000 and \$34,000, respectively, which houses have a rental income of \$820 monthly. Appellee has been in Europe since September last, and has returned to Los Angeles and started another business. Evidently the appellee, Harry Paris, is the "poor little rich boy."

Conclusion.

The summary judgment of the lower court should be reversed. The patent in suit should be adjudicated valid, and infringed by said appellee. A permanent injunction should issue against the appellee enjoining him from further infringement of the appellants' patent in suit. The Court should order an accounting for damages against appellee in favor of appellants for infringement by appellee of the appellants' patent in suit. And the Court should award costs and disbursements of this suit and an attorney's fee to appellants, and such other and further relief to appellant as to the Court may seem proper.

ALAN FRANKLIN,

Attorney for Appellants.

Dated: Los Angeles, California,
December 23, 1955.

No. 14800

In the
United States Court of Appeals
For the Ninth Circuit

FRANCES P. SYRACUSE and NEW
WONDER BAG CORPORATION,
Appellant.

vs.

HARRY PARIS, et al.,

Appellees.

Petition for Rehearing

ALAN FRANKLIN
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FILED

JUL -5 1956

PAUL P. O'BRIEN, CLERK

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Appellees.

No. 14800

Petition for Rehearing

*To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:*

Comes now the appellant and petitions this Honorable Court for a rehearing of this appeal, upon the grounds hereinafter set forth.

At the outset of this petition for a rehearing it behooves the appellants to point out to this Honorable Court a fatal defect in the appellees' (defendants') Amended Answer, filed April 1, 1954, which defect forecloses appellees' astute attorney from foolishly prating about his pet delusion that the invalid Shanzer-Design patent 147,477 is an anticipation of the appellants' novel and highly useful *mechanical utility* patent in suit, No. 2,533,850. The defect in the appellees' (defendants') Amended Answer, which eliminates the

appellees' (defendants') alleged false *defense of invalidity of the patent in suit*, is the failure of defendants' attorney to *plead* said Shanzer Design patent in his Amended Answer, and particularly in Paragraph IV thereof (Tr. pp. 6 and 7).

Patent Laws, January 1, 1953, §282,

“The following shall be defenses in any action involving validity or infringement of a patent and *shall be pleaded.*”

§102.(b) Conditions for patentability.

Said Shanzer patent appears for the first time, *not in a pleading*, but in a *self-serving affidavit of defendants' counsel, C. G. Stratton*, sworn to September 3, 1954, over *five months* after said Amended Answer was filed. *No date* is noticed, by defendants' attorney or anyone, for hearing the defendants' motion for summary judgment, and it does not appear in the Transcript of Record when said motion was heard, or that said motion was heard on the *pleadings* and particularly the Amended Answer. If said motion was heard on anything but the pleadings, as it appears, said summary judgment is ineffective, at least in so far as the Shanzer patent is concerned. The affidavit of the defendants' (appellees') attorney (Tr. pp. 12-13), is *not a pleading*, which is required for setting up a *prior patent to invalidate a patent* in suit, which can only be invalidated by properly *pleading* such invalidity and *by proof of the same beyond a reasonable doubt*.

“Ordinarily an affidavit by an attorney is insufficient to support a motion for summary judgment.” *Cornacchio v. Coniglio*, 11 F.R. Sec. 83.611, Case 2; 7 F.R.D. 749 (D.C. E.D. N.Y., 1947).

“An affidavit of counsel in opposition to a motion for summary judgment does not meet the requirements of Rule 56 since the attorney is not a competent *witness*. *Robinson v. Waterman S.S. Co.*, 11 F.R. Serv. 56 c. 41, Case 5; 8 F.D.R. 155 (D.C.D. N.J.)”

The Shanzer patent No. Des. 147,477 is the booby prize of the appellees' defenses in that it *eliminates itself as prior art* for the patent in suit and condemns itself out of its own mouth. The *date* of the Shanzer patent, Sept. 9, 1947, which appears on its face, is not *more than one year prior to the application date Sept. 13, 1947*, of the Syracuse patent in suit No. 2,533,850, and consequently the Shanzer patent, if valid, which it is not, *is not prior art*, and since the Shanzer patent is asserted by appellees' attorney, on page 3 of Appellees' Brief, that “*The closest prior patent is probably Shanzer patent No. Des. 147,477,*” said patent is the dominant exhibit of said attorney's ill-advised motion for summary judgment which subjects said appellees' attorney to a punitive fine by this Honorable Court for filing a frivolous motion.

The fact that the Shanzer patent is not prior art compared to the Syracuse patent in suit and cannot be set up to anticipate the patent in suit is governed by a statute of limitations as follows:

Patent Laws, January 1, 1953, U.S.C., Title 35

“§102. Conditions for patentability; novelty, etc. A person shall be entitled to a patent unless—
(b) the invention was *patented* or described in a printed publication in this or a foreign country or in public use or on sale in this country, *more than one year prior to the date of the application* for patent in the United States.”

The Shanzer Bag was *not patented* (Sept. 9, 1947) “more than one year prior to the date of the (Syracuse) *application* (Sept. 13, 1947) for patent in the United States.” The Shanzer bag was *patented Sept. 9, 1947, only four (4) days “prior to the date of the application” Sept. 13, 1947* for the Syracuse patent in suit.

The conditions for patentability of the above patent statute §102 (b), which is the law of the land, has reduced the Shanzer patent to a fatal anachronism, and to *innocuous desuetude*, so far as the Syracuse patent in suit is concerned.

A grave injustice has been done to plaintiff-appellants, by the crude and most irregular judgment of the District Court, and the legally-unsupported affirmance of said judgment by this appellate court, in view of Rule 56 (c) of the Federal Rules of Civil Procedure, and the ruling law of this circuit as established by this court in the case of *Hycon Mfg. Co. v. H. Koch & Sons* (C.C.A. 9), 104 U.S. P.Q. 231, and the following cases decided by the Court of Appeals of this circuit, which hold that the question of *invention* is a *question of fact*.

Crowell v. Baker Oil Tool Co., (9th Cir.), 153 F. 2d 972, has held as follows:

“The question whether or not a new and useful combination is the result of mere *mechanical skill or of inventive faculty* is one of fact.”

Faulk v. Gibbs, 174 F. 2d 34 (C.C.A. 9);

Pointer v. Six Wheel Corp., 177 F. 2d 153 (C. C.A. 9);

Stoody Co. v. Mills Alloys, (C.C.A. 9) 67 F. (2d) 807, 812;

Shumacher v. Button Lath Mfg. Co., (C.C.A. 9) 292 F. 522, 533.

Other cases decided by this Circuit Court of Appeals hold that the question of *infringement* of a patent is also a question of fact.

Reinharts, Inc. v. Caterpillar Tractor Co., 85 F. (2d) 628, at p. 630, C.C.A. 9 (1936);

McRoskey v. Braun, 107 F. (2d) 143, 147 C. C.A. (1939);

Nichol v. Schick, 98 F. (2d) 511, 513 (1938).

The question of *invention and validity* of a patent has been held by the U. S. Supreme Court to be a question of fact.

Thompson Spot Welder Co. v. Ford Motor Co., 265 U.S. 445, 446, 44 S. Ct. 533, 68 L.ed. 1098.

The leading textbook, Walker on Patents, Deller's Ed., Sec. 25, pages 112 and 113, states:

“That the question of *invention is a question of fact.*”

The question of *infringement* of a *patent* has been adjudicated by the *Supreme Court to be a question of fact*.

Stilz v. U. S., 269 U. S. 144, 147; 70 L.ed. 202.

The leading textbook on patents, Walker on Patents, Deller's Ed., p. 1680, sec. 450, holds:

"Infringement is a question of fact."

See *Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 213 U.S. 301, 302, 311 and 319, 29 S. Ct. 495, 53 L.ed. 805;

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 416, 422, 28 S. Ct. 748, 52 L.ed. 1122.

See also 1955 Cumulative Supplement, Walker on Patents (Deller's) Vol. III, page 1680, §450, Infringement defined.

The above authorities cited on Appellants' Motion, after refusal of this Court to hear appellants' appeal, on a false issue raised by attorney for appellee, nullified the summary judgment of the lower court and left this court with no alternative other than to reverse and vacate said summary judgment of the lower court and remand the case to the lower court for trial *de nova* on the merits.

It should be obvious, in view of Rule 56 (c) and the above cited authorities, that no patent infringement suit is dismissable by summary judgment, in view of the major issues of material facts which the questions of *invention* and *infringement* necessarily raised on

such motions in patent litigation. It was hoped that this Court would recognize said basic conclusions of patent law on this appeal of the wild summary judgment of the lower court in this case. However, the decision of this Court in this particular case and *circuit*, "cannot be considered as too much authority for the upholding of summary judgments in patents suits," as this Court states in its opinion at the end of page 3 thereof. Counsel for appellant does not agree with the opinion of this Court that the "trial court was correct in its disposition of the case . . . due to the manner in which the case was presented to the trial court." Rule 56 (c) F. R. C. P. provides:

"The judgment sought shall be rendered forthwith if the *pleadings* . . . show that, except as to the amount of damages, *there is no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law."

In the case at bar the pleadings clearly show that the appellant, Syracuse, has a patent for an invention, which is *prima facie valid*; that said pleadings raise the issue of *validity* of said patent and the issue of *infringement* thereof, which issues are *genuine issues of fact*; and the pleadings present a *prima facie showing of infringement of said letters patent by the defendant*, for which the defendant is liable for damages and an injunction.

In view of the genuine issues of fact raised by the pleadings, the trial judge should have *denied* the defendant's legally defective motion for summary judg-

ment, and it was gross error of the trial judge to grant the defendants' motion for summary judgment and hold the patent in suit invalid and particularly, on defendants' attorney's *single self-serving affidavit only*, when the patent law requires that a patent can be held invalid only by *proof beyond a reasonable doubt*.

"In a patent suit, defendants' motion for summary judgment, based in part on an averment of invalidity for want of invention in view of prior art, was denied." *Kendall Co. v. Earnshaw Knitting Co.*, 3 F.R. Serv. 56 c. 41, Case 4; 1 F.R.D. 357 (D.C. D. Mass., 1940)

"Summary judgment should not be granted in a patent suit in which the issues involve the validity and alleged infringement of unadjudicated patents" *Refractolite Corp. v. Prismo Holding Corp.*, 1 F.R. Serv. 56 a. 24, Case 1; 25 F. Supp. 965 (D.C. S. D. N.Y., 1938).

"Summary judgment may not be granted if any genuine issue of a material fact exists on which there is a right to trial by jury or by the court. All doubts must be resolved against the moving party."

Griffith v. Utah Power and Light Co., 21 Fed.

Rules Serv. 56 d, Case 2; F. (2d)

Williams v. Carolina Life Insurance Co., 348 U. S. 802;

McAlester v. United States, 348 U. S. 19.

"Summary judgment may not be granted if there are genuine issues of material facts to be resolved."

(*Petition for Rehearing granted*) U. S. Court of Appeals, Fifth Circuit, May 27, 1055, 21 Fed. Rules Serv. 56 c. 41, Case 4; F. (2d)

.....

A false issue was injected into the appeal of this case by the appellees' attorney in a futile effort to divert the attention of this Court from the real issues of this appeal and the merits of this case, but this Court in its recent opinion of this appeal evidently got a glimmer of appellees' attorney's spurious issue, when the lost patent in suit No. 2,533,850 came home to roost, to the Clerk of this Court, at the threshold of this appeal. Evidently appellees' attorney got scared and filed the patent in suit with the Clerk of this Court when he remembered that counsel for appellant had accused him at the hearing of this appeal of having said patent surreptitiously in his possession and that the matter would be presented to and investigated by the State Bar, and when he also remembered the affidavit of the appellant Mrs. Syracuse, swearing that she actually saw the appellees' attorney C. G. Stratton pick up her patent from the reporter's table at the close of the deposition of the defendant Paris by her former attorney, Mr. Geauque. While appellees' attorney denied that he unlawfully misappropriated the appellants' patent at the defendants' deposition, it is rather significant that his denials are *not under oath*, and it is also rather significant that the *patent in suit was kept out of the files of the lower court and out of access of appellants' attorney and this Court, until*

after the hearing on this appeal, which concealment of said patent from this Court mislead and caused this Court erroneously to refuse to hear oral argument of appellants' counsel because he did not have in his possession the actual patent in suit, which as a matter of law was of no consequence, and it was error on the part of this Court in view of Section 1774, Title 28, Ch. 115, which provides:

“Copies of letters patent or any records, books, papers, or drawings belonging to the Patent Office and relating to patents, authenticated under the seal of the Patent Office and certified by the Commissioner of Patents, or by another officer of the Patent Office authorized to do so by the Commissioner, shall be admissible in evidence with the same effect as the originals.”

It was appellees' attorney on page 1 of the Appellees' Brief who first raised the *false* issue that the patent in suit was not in the Transcript of Record and stated that if the Court wished to be technical, this appeal could be dismissed upon that ground alone. Evidently said statement misled this Court at the hearing of this appeal, when it refused, contrary to the law (Sec. 1774, Title 28, Ch. 115), to allow counsel for the appellant to proceed with his argument without possession of the actual patent in suit, which at this time was unlawfully in the possession of the appellees' attorney, who had picked up said patent at the end of the deposition of the defendant Paris, and put said patent in his brief bag and walked out of the deposi-

tion room with it, and has retained said patent in his possession until recently, after the hearing of this appeal, when he filed said patent with the defendants' deposition in the office of the Clerk of this Court. Fortunately for the appellants' the appellant, Mrs. Syracuse, *saw* the appellees' attorney pick up her patent and walk out of the deposition room with it for the purpose of suppressing the same — *valuable evidence criminally suppressed by defendants' attorney from appellants' counsel and this Court to obstruct and prevent the administration of justice in this case.*

The appellant, Frances P. Syracuse, in her affidavit attached to Appellants' Motion To Reverse and Vacate Summary Judgment of Lower Court, etc., dated February 6, 1956, avers as follows:

“At the taking of said deposition of said defendant-appellee Harry Paris, my attorney, Robert E. Geauque, introduced in evidence my Letters Patent in suit No. 2,533,850, and I saw it handed to the deposition reporter and notary public who marked my said patent Plaintiffs' Exhibit ‘C’. (See deposition of said defendant Harry Paris, page 23.) When the deposition of said defendant Harry Paris was completed, I saw said C. G. Stratton, attorney for said defendant Harry Paris, pick up my said patent (which was then in evidence) and put my patent in his briefcase and walk out of the deposition room with my patent and I have never seen and neither has my attorney, Robert E. Geauque, who took the defendants' deposition, my patent since.”

The above-quoted affidavit of the appellant, Mrs. Syracuse being under oath, the *unverified* denials, and the false statement by appellees' attorney to this Court at the supposed hearing of this appeal, that "*the patent was before the lower court,*" only emphasize the truth of Mrs. Syracuse's affidavit, and condemn said dishonorable attorney out of his own mouth.

Counsel for appellants heard the appellees' attorney in court tell this Court that the original patent in suit was before the lower court, but it is significant that there was never any record of said patent being before the lower court and the trial judge, while he remembered the details of the case could not actually remember ever seeing said patent, but believed there was a certified copy of the patent in evidence before the court, which was counter designated by the appellees' attorney on page 31 of the Transcript of Record, as "File Wrapper and contents of the patent in suit." The trial judge was obviously correct, because the patent was at the outset delivered by the appellant, Syracuse, to her first attorney, Robert E. Geauque, who introduced said patent in evidence while taking the deposition of the defendant, Harry Paris, where the appellees' attorney C. G. Stratton *stole* said patent and *unlawfully retained* it in his possession until after the hearing of appeal of this case, so that appellants' counsel could not produce it when this Court arbitrarily required him to do so, and refused to hear said counsel's oral argument for that reason, in the face of a Federal statute authorizing the use of copies of said patent, Title 28, Ch. 115, Section 1774. Appel-

lants' attorney is satisfied that the trial judge never saw the original patent in suit, but had only the "File Wrapper and contents of the patent in suit," as counter designated (Tr. p. 31) by appellees' attorney, and that this Court's arbitrary ruling depriving counsel for appellant of the right to argue his case without the original patent in suit stems only from the unmerited self-serving statement of appellees' attorney, in Appellees' Brief, (first page) that "*It will be noticed that the patent in suit is not in the Transcript of Record. If the Court wishes to be technical, this appeal could be dismissed upon that ground alone,*" as if the patent in suit was indispensable to a valid judgment of this Court. Later on when appellees' attorney learned the real law, Title 28, Ch. 115, Sec. 1774, that copies of an original patent could be admitted in evidence in place of the original patent, he adopted said law as his own, in his overdue Appellees' Reply To Appellants' Motion to Reverse, etc., in his following language:

"The original patent is worthless to counsel or to anyone else, except as a matter of pride to the patentee, etc. . . . For all purposes of this or any other lawsuit, A CERTIFIED COPY would be fully as good as the original."

AND SO "THE LEOPARD HAS CHANGED HIS SPOTS"

It is obvious that the patent in suit was *not before the lower court*, because it was at the time surreptitiously in the possession of plaintiffs' (appellees') attorney C. G. Stratton, who had an ax to grind in concealing said patent from said court and the appellant, Mrs. Syracuse, which patent said unethical attorney for defendant (appellee) had stolen from the plaintiff, Mrs. Syracuse, a year before the motion for summary judgment, at the end of the plaintiffs' deposition of the defendant, Paris.

In view of the unethical and shyster practice of the appellees' attorney in stealing the appellants', Mrs. Syracuse's, patent, and, in falsifying the fact to this Court that the patent in suit was before the lower court, when it was not, for the purpose of inducing this Honorable Court dismiss the appellants' appeal, contrary to law, Title 28, Ch. 115, Section 1774, because they could not produce the patent in court when it was in the possession of appellees' attorney, it is the manifest duty of this Honorable Court to disqualify and remove the appellees' attorney, C. G. Stratton, completely from this case. The State Bar is going to disbar said attorney from practice in this State anyway. He is a bad actor, and was some time ago forced to resign from the Los Angeles Patent Law Association for unethical advertising, and for insulting the officers of the L. A. Patent Law Association when he was admonished for engaging in such advertising.

It is noted in this Court's opinion, page 2, that the record needed no supplementing by the offer of appellants' counsel of a certified copy and a government-printed or soft copy of the patent in suit, when the Court already had appellee's certified copy of the File Wrapper and contents of the patent in suit and the record needed no "supplementing." The Court admitted that it had the File Wrapper and contents of the patent in suit, which was the same legal document upon which the lower court rendered its irregular and illegal summary judgment, from which appellants appeal, and consequently the subject matter of the summary judgment and this appeal therefrom are one and the same, to-wit: the patent in suit, which may be evidenced in both the lower and this Court by certified and other copies of said patent as the record of the case presents according to Title 28, Ch. 115, Sec. 1774. The reason counsel for appellant offered to supplement the record at the hearing of this appeal with documents he knew were legal and official, was because he was unable to find the patent in suit or a certified copy thereof in the file of the case in the District Court Clerk's office, from which file important papers had obviously been removed, and counsel for appellant was desirous of having only authentic documents in the Court's possession. Counsel for appellant did not actually know that there were certified copies of official documents of the patent in suit in the Transcript of Record until after the hearing of the appeal, when he actually saw the papers which were on file in the office of the Clerk of this Court. What appellants' counsel could not understand at first

quired said exhibit might be a convenient anchor to the windward for the appellants. We do not agree with the Court's Opinion that plaintiffs apparently "resisted the motion for summary judgment with no affidavits that tendered any issue of fact." The *two* affidavits that established the fact that Plaintiffs' Exhibit X, Brief Case, was given to appellant's counsel over ten years before the analogous Shanzer Utility Bag was patented, raised the factual issue that the Shanzer patent is invalid in view of the prior Plaintiffs' Exhibit X.

AFFIDAVITS

Affidavits are not indispensable in a motion for summary judgment. In Rule 56(b), F. R. C. P., it is provided: "A party against whom a claim etc. is asserted etc. *may* at any time, move *with or without supporting affidavits* for a summary judgment" etc. Rule 56(c) provides: "The judgment sought shall be rendered forthwith if the pleadings etc., together with the *affidavits, if any*, show etc. there is no genuine issue as to any material fact" etc. It has above been pointed out in numerous authorities that the questions of *validity and infringement* of a patent are genuine material issues of *fact*, which, in this case, defeat the lower court's summary judgment, because those material issues of fact were *raised by the pleadings* in the lower court, and by the Brief Amicus Curiae of Alan Franklin, filed in the lower court with said court's *permission, before* the Summary Judgment of said court was rendered. (See pages 4-5 of said brief).

We do not agree with the Court's Opinion, page 2, that "It does not appear that the defendant's affidavits set up any inconsistencies or contradictions requiring a trial." We find only *one* affidavit, and that one by the defendant's attorney, in the Transcript of Record, which affidavit mentions the Shanzer (Des.) Patent—Sept. 9, 1947, but defendant failed to plead said patent in his Amended Answer, in accordance with §282, Ch. 29, Title 35, Patents, U. S. Code 1953. Said *attorney's affidavit*, moreover, is not admissible under Rule 56 because the *attorney* in a motion for summary judgment cannot be a *witness* for the defendant on such motion.

In the last analysis of the case the summary judgment of the lower court is not supported by a scintilla of evidence, since the affidavit of the defendant's attorney, C. G. Stratton (Tr. pp. 12-13) cannot be accepted as *evidence* by this Honorable Court, and said defendant (appellee) *has no other evidence*. On the other hand appellant's have two affidavits and a photograph of the brief case or handbag, Plaintiffs' Exhibit X, in evidence, and while the court may disregard the affidavit of appellant's attorney, Alan Franklin, the affidavit of J. Calvin Brown (Tr. p. 22), said photograph and the worn actual handbag, Exhibit X, still in appellant's possession, give the appellant's the preponderance of evidence in this case, and they are entitled to a judgment of reversal and dismissal, by this court of the lower court's summary judgment, and the appellants are further entitled to a mandate of this

court ordering the lower court to proceed forthwith on the merits of the case at bar.

The bald contention of the appellee's attorney that the Commissioner of Patents *failed to cite* against the application for the patent in suit *the most pertinent prior art* including the Shanzer Design Patent, No. 147,477, exposes the key to defendant's (appellee's) attorney's pseudo defense, that the able, expert, experienced and highly efficient Patent Office examiners are not quite as capable or more capable than he or other outside unofficial and less experienced patent searchers are to make searches in the Patent Office. The fact that the Shanzer patent was not issued *more than one year* before the application for the patent in suit was filed in the Patent Office, eliminated *prima facie*, at least the Shanzer patent as prior art and a reference against the patentability of the appellant Syracuse's patent in suit. The inapplicability of the Shanzer patent as an anticipation of the patent in suit was overlooked by the appellee's attorney, but was *discovered by the abler examiner* in the Patent Office, and was the valid reason why the Patent examiner did not cite the Shanzer patent against the patent in suit. This is an illustration of the fact that the Commissioner of Patents, not appellee's attorney, cited the most pertinent prior art against the Patent in suit. The lower court's so-called Finding of Fact (8) is, not only a gross error, but is an obvious absurdity. The Commissioner of Patents certainly *did not fail* to cite against the application for the patent in suit the most pertinent prior art, *by not including the irrelevant and self-*

eliminated Shanzer, Design Patent No. 147,477, which discloses nothing but its external so-called ornamental appearance, no part of which is novel, in view of Plaintiff's Exhibit X, except possibly the bows on the front wall of said design patent, at diagonal corners of said front wall, in Fig. 1 of said patent, which bows are not included in the patent in suit and are no part of the invention of the appellant's said patent. Said Shanzer patent absolutely does not describe or show the combination claimed in the patent in suit, and the last sentence of said Finding of Fact (8) attempting to define the invention of the patent in suit is nothing but an irresponsible unsupported conclusion of law. Finding of Fact (8) was obviously written by the appellee's attorney, because it has all of the sardonic earmarks of the defendant's (appellee's) attorney. The last sentence of said Finding of Fact (8) shows the unmitigated presumption of said attorney in attempting to define invention, which defies definition. Every time the question of defining what constitutes invention has been submitted to the Supreme Court for adjudication that high Court has side-stepped that question.

The so-called remaining pertinent prior art patents are more remote from the patent in suit, as indicated in Appellee's Brief, than the Shanzer patent which on its face is eliminated as prior art against the patent in suit. All of said remaining unofficial patents set up are too large, clumsy and heavy to be used as nursing bags for babies by mothers carrying their babies. There is no suggestion in any of said remote patents of the possible use of the same as nursing bags for babies, and

there is no evidence whatever that any of said patents were ever used for anything whatever and none of them are on the market today. Said patents are nothing but worthless paper patents without utility, which have contributed nothing *to the progress* of science and useful arts. All of the prior patents of the so-called prior art are superseded by the highly meritorious invention of the nursing bag of the appellant Syracuse's patent in suit. Every prior patent cited against the patent in suit is, to say the least, of doubtful novelty, utility or patentability. Such doubts have been removed from the appellant's patented bag, the patentability of which has been conclusively established by the extraordinary commercial success and practical utility of the appellants' patented bag, from the benefits of which invention the inventor, Frances P. Syracuse, has been deprived by the wilful, wanton and unscrupulous infringers, who should be behind the bars. The defendant in the present case sold the appellants' patented bag the first year to the amount of \$100,000. Another dishonorable infringer has become a millionaire from his ill-gotten gains by infringement of the appellants' patent. We can name many other wilful infringers, but the appellants will not bother to name them, when it will be infinitely more profitable to sue them promptly in other circuits.

The Shanzer invalid patent was still-born in the public domain when the Plaintiffs' Exhibit X had been on sale and in public use for over ten years prior to Shanzer's date of application for patent, and anyone, including the appellants, could have made, used

and/or sold the Shanzer, so-called, *patented* bag with impunity, in view of said Plaintiffs' Exhibit X. The Shanzer design patent discloses nothing but the *external appearance of the ornamental design* of the Shanzer bag, which disclosure finds its legal analogue in the equivalent Plaintiffs' Exhibit X. The invention of the novel *combination of mechanical elements of the claim* of the patent in suit is not disclosed in the Shanzer bag because said novel combination of elements of the invention of appellants' patented bag is concealed within the bag of the patent in suit of appellants' invention and are not exposed to view. Any structure which is concealed is not a subject of a *design* patent which covers nothing but the appearance of a design.

"Inasmuch as design patents are based upon the appearance or impression created, the things which are usually hidden from view are not embraced in design patents."

Patent Law and Practice—Amdur 64, sec. 49:

"It (insulating plug—Ed.) is used overhead, out of reach and out of sight to the naked eye, so far as its design is concerned, and when in use is covered up." (Design of plug not patentable.) *Williams v. Syracuse Co.*, 161 Fed. 571 (N.D. N.Y. 1908).

There is *no mechanical structure whatever inside of the Shanzer external design* patent and consequently the invention of the patent in suit is neither on the outside nor inside of the Shanzer ornamental patent.

We do not agree with the court's opinion "that one look at the bag is enough to convince a court that it lacks the elements that the United States patent laws were intended to protect." Such opinion might apply only to a design patent, but the *patentability of a novel mechanical functional* invention like the invention of the patent in suit cannot be determined merely by just looking at the *outside* of it. With appellant's invention absent from the *inside* or outside the Shanzer bag, to attempt to find the appellants's invention in the Shanzer bag by merely looking into the space inside of the bag, would be like looking into a dark closet for a black hat which is not there.

"A prior device, in order to anticipate, must have been *complete, and capable of producing the result sought to be accomplished*, and this must be shown by the defendant."

Cold Metal Process Co. v. Carnegie-Illinois Steel, 180 F. (2d) 322, C.C.A. 3 (1939) c. a. 309 U.S. 665, 84 L. Ed. 1012 (1940).

The Shanzer patent fails to show or describe the following indispensable elements of the patent in suit:

1. Two laterally spaced longitudinally extending normally closed zippers 23 and 24.
2. The two zipper openings being separated by a narrow strip 25.
3. A waterproof longitudinal panel 32 dividing the interior of the bag body 10 into two laterally spaced diaper compartments 33 and 34, one of which compart-

ments to contain clean diapers, and the other compartment to contain soiled diapers.

4. Zippers 23 and 24 operable from the outside of the bag.

5. Waterproof plastic sheeting 46 attached to inside of the bag body 10 along the edges of the end zipper-closed pockets 50 for nursing bottles 51.

All of the above elements of *the claim* of the patent in suit, except the zippers, are *concealed within* the bag 10 of the patent in suit, but none of said elements, which constitute the invention of the patent in suit, and are not found in the Shanzer or patents of the appellee's alleged so-called closest of the prior art.

“Prior patents cannot be reconstructed in the light of the invention involved in a patent infringement suit, and then used as part of the prior art.” (*Payne v. Williams-Wallace Co.*, 117 Fed. (2d) 283 C.C.A. 9 (1941), c. d. 313 U.S. 572, 85 L. Ed. 1530).

In *Electro Mfg. Co. v. Yellin* (C.C.A. 7) 56 U.S.P.Q. 290, 292; 132 F. (2d) 979, it was held:

“Of course anticipation of a mechanical patent (like appellants' patent) is not established by a design patent (like Shanzer's) which does not disclose the structure of the mechanical patent.”

Appellee's attorney in attempting to invalidate the patent in suit takes a plurality of unused and unknown paper patents of the prior “rot” and argues that by modifying them in the light of the patent in suit a syn-

thetic bag structure may be produced *nunc pro tunc* to anticipate the invention of the Syracuse patent in suit, but such practice has long ago been condemned by the Supreme Court in *Topliff v. Topliff et al*, 145 U.S. 156, 36 L. Ed. 658 and by *Kellogg Switchboard & Supply Co. v. Michigan Bell Tel. Co.*, 99 F. (2d) 207; cert. den. 308 U.S. 582, 84 L. Ed. 488 (1939).

See also *Williams Mfg. Co. v. United States Shoe Machinery Corp.*, 121 F. (2d) 273. Affirmed 316 U.S. 364, 62 S. Ct. 1179.

All of the "so-called closer prior art patents cited by appellees' attorney are designed and adapted for different purposes from that claimed by the patent in suit.

"A prior device does not anticipate even though by modification it may be made to accomplish a function performed by the patent in suit, if not designed for that purpose by its maker or adapted for use therefor." *Kellogg v. Michigan Bell, supra*.

"Nor is it proper, in determining patentable invention, 'to take this and that from the references and achieve a *nunc pro tunc* solution of the problems confronting the inventor when he made his invention.' " *Luck v. Coe*, 69 F. (2d) 379, App. D.C. (1934); *Ace v. Exhibit Supply*, 119 F. (2d) 349, mod. 315 U.S. 126, 86 L. ed. 736.

APPELLEES' LACK OF DEFENSE

Finally, this court has overlooked the fatal weakness of the appellees' lack of defense on this appeal, and has misspent its time in trying to throw the appellants' meritorious case out of Court on a false technicality ill-conceived by appellees' attorney. His entire policy of his pseudo defense is nothing but spoilation of the record and confusion of the real merits of the case, but he is only basking temporarily in the sunshine of a fool's paradise, with no evidence, that a court of justice can recognize, to prove anything in his favor. He cannot act as a *witness* in this case and attorney for the defendant, and he has no witness to prove anything. All evidence which he has attempted to introduce in the case by way of affidavit must necessarily be stricken, and the appellees' case falls to the ground. It is idle for such an attorney to attempt with no evidence to prove the appellants' patent in suit invalid in the face of the *statutory* presumption of validity of the patent in suit (Title 35, U. S. Code, Ch. 29, Sec. 282), which presumption can only overthrow by proof beyond a reasonable doubt which proof requires a trial on the merits of the case, which appellants have been unlawfully denied and are entitled to.

CONCLUSION

The plaintiffs-appellants have been subjected to great injustice by the Federal courts of their home circuit. Their patent in suit was not before the lower court, yet that court irregularly rendered a summary judgment on that absent patent, which was wrong, and this court has not vacated and dismissed, and righted that irregular and wrong summary judgment. Two "wrongs" do not make a "right." The appellants' counsel was thrown out of the Temple of Justice because this court only thought that he did not come into said temple through the front door, but the court was obviously mistaken, as pointed out in this petition. *The plaintiffs-appellants have not had their day in court.* Reform of the American patent system is in order.

WHEREFORE appellants demand that this court vacate and dismiss the summary judgment of the lower court and remand this case to the lower court for trial on its merits *de novo*, and *that appellants have their day in court.*

Respectfully submitted,

ALAN FRANKLIN

Attorney for

Appellant-Petitioner

CERTIFICATE

I hereby certify that I am counsel for the appellant and petitioner, and that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

ALAN FRANKLIN

No. 14800

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANCES P. SYRACUSE and NEW WONDER BAG CORP.,
Appellants,

vs.

HARRY PARIS,

Appellee.

APPELLEE'S BRIEF RE PETITION FOR RE- HEARING.

C. G. STRATTON,
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Attorney for Appellee.

FILED

AUG -3 1956

WARNER, PERACCA & COWAN,
HENRY N. COWAN,
Of Counsel.

PAUL P. O'BRIEN, CLERK

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**APPELLEE'S BRIEF RE PETITION FOR RE-
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Background.

To understand why Appellants' counsel writes briefs as he does, a little background of the man is necessary in order to understand him. After the Motion for Summary Judgment had been granted in this case, and before the appeal had been perfected, a conference was held by Alan Franklin, counsel for Appellants, Henry N. Cowan, of counsel for Appellee, the Appellee himself, and the undersigned.

At that conference, it was pointed out to Alan Franklin the extreme closeness of the Shanzer patent, and it was shown to him that he should not put both parties to the expense of an appeal in a case that was so hopeless. His reply was amazing. Franklin at that time (April 11,

1955) in the office of the undersigned, with the foregoing parties present, stated,

“Well, I am trying to reform the Patent System. I want to show the Federal Courts and especially our Court of Appeals that it is not capable of handling patent cases and should not hear them!”

Bitter Attacks.

In the first of his four (so far) Petitions and Supplemental Petitions, to wit, on page 28 of his printed Petition for Rehearing, Franklin for the first time admits of record in this case that he is crusading for “Reform of the American patent system”.

In his attempt to reform everybody (but himself), he attacks the undersigned, the lower court, this Honorable Court, unnamed alleged infringers, and Appellants’ former counsel. The judgment of the lower court was called “crude and most irregular” [(1), p. 4]. The Summary Judgment by the lower court was called a “wild summary judgment”, Certain findings and conclusions of the lower court were termed an “absurdity” and “irresponsible” [(1), pp. 20-1]; he claimed some other matter was “carelessly overlooked” [(2), p. 7]. None of which is correct.

This Honorable Court came in for more than its share of venom. This Court is charged with refusing to hear Crusader Franklin, “because he did not have in his possession the actual patent in suit” [(1), p. 10]. This, of course, is 100% in error. The hearing in this Court was castigated as a “supposed” hearing [(1), p. 12], and on the

(1) Printed Petition for Rehearing. Hereinafter referred to as (1).

(2) First Supplemental Petition for Rehearing, dated July 14, 1956. Hereinafter referred to as (2).

same page this Court was accused of being “arbitrary” [(1), twice, pp. 12 and 13]. If the undersigned may be permitted a word on behalf of this Honorable Court, I would say that this Court was extremely patient with Alan Franklin at the hearing, in view of his woeful lack of understanding of this case.

Further charges against this Court by Reformer Franklin are that this Honorable Court “misspent its time” [(1), p. 27] in this case. He claimed that, “A court of justice” [(1), p. 27] would recognize the real merits in this case, inferring that this is not such a court. He then positively asserted that his clients have been “unlawfully” [(1), p. 27] denied their rights.

This Honorable Court is also accused that it could not or “would not consider a hearing” in this case “on anything but the original patent” [(1), p. 16]. Of course, this Court did not say any such thing! Counsel also complains that this Court threw him “out of the Temple of Justice” because “he did not come into said temple through the front door” [(1), p. 28].

This Court was placed in the same deplorable category as the lower court, to wit, of being accused of having “carelessly overlooked” some element [(2), p. 7].

The final shot at this Court (so far—for undoubtedly there will be continued Supplements and Supplements to Supplements, until this Court decides his Petition for Rehearing), was as to this Court’s alleged “misunderstanding of the patent law” [(3), p. 3]. There was also the none too veiled threat to this Court that Crusader Franklin “hopes that he will not be required to secure a ruling

(3) Letter to Paul P. O’Brien, Esq., Clerk of the Court, dated July 19, 1956. Hereinafter referred to as (3).

from the Supreme Court” as to the admissibility of copies of patents [(1), p. 16]. The fact that this Court has never made such a ruling seems not to perturb the Reformer in the slightest. He primarily wants to reform the American Patent System.

Further Attacks.

In order to pass around his poison, Reformer Franklin calls alleged infringers (other than Defendant-Appellee) “unscrupulous infringers, who should be behind the bars”, and he levels off at one unnamed “dishonorable infringer” [(1), p. 22].

Even Appellant’s former counsel, Robert E. Geauque, comes in for his share of attack. He is accused of “incompetence” and “collusion” with the undersigned. In line with his throwing around of insinuations, Franklin threatens further action before the State Bar [(3), p. 4]. If his claimed future action is as baseless and ill-fated as the first attempt which he helped his client make, the State Bar will have little to do with his claims. His client admitted under oath that her first complaint to the State Bar against her former counsel, Robert E. Geauque, was false.

Since the undersigned seems to Reformer Franklin to be standing in his way, his heaviest guns are leveled at the undersigned. I am reminded of an old couplet:

“What all experience tends to show:

No mud can hurt you but the mud you throw.”

The attacks on the undersigned are not only wholly irrelevant to this case, but are believed to be entirely unfounded. Not that the Martindale-Hubbell directory is the final arbiter in such matters, but it is noticed that Alan Franklin has been admitted to practice law almost fifty years, but they do not give him any rating. The undersigned has the highest rating, and is and has been for some time a member of Committees of the two national organizations of patent lawyers: the Patent Section of the American Bar Association and the American Patent Law Association. It is believed that the undersigned has built up a reputation for conscientious work for clients: the continued growth of his practice would so indicate.

It should be added that the undersigned was not forced to resign from the Los Angeles Patent Law Association. He did resign from it about eighteen years ago, although he was asked at the time not to do so, and has been asked several times since then to re-join. He did not engage in unethical advertising eighteen years ago, as claimed, nor at any other time. He is not sure whether he “insulted” the officers of that Association eighteen years ago, but is of the opinion that he did not. It is not clear what constitutes an “insult” of an officer of such an Association.

The credibility of Crusader Franklin’s attacks can be judged by his continued claim (despite clear facts to the contrary) that the undersigned “stole” the Appellants’ original patent. The fact that it is and has been in the office of the Clerk of this Court does not seem to faze Alan Franklin.

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Issues.

It is fully realized by the undersigned that the foregoing is not determinative of any issues in this case, but petition is made for this Honorable Court's indulgence in permitting the undersigned to answer the personal slurs, innuendoes and absolute misstatements of fact made against him by appellant's counsel. They just could not go unchallenged.

After taking out all the attacks from Alan Franklins' several briefs, there is not much left. He still has learned nothing in this case. He still does not know why Circuit Judge Fee said at the hearing that he wondered why Alan Franklin had not filed an affidavit in the lower court that had something to do with this case, instead of the affidavit about the irrelevant briefcase, "Exhibit X".

Alan Franklin still does not know that the prior patent to Shanzer constitutes an anticipation of the patent in suit whether it is valid or invalid. Shanzer was the prior inventor as shown by the Patent Office records, valid or invalid.

Alan Franklin still does not know that a design patent can and does anticipate a mechanical patent. He is too busy reforming to worry about these things.

Franklin's argument about an attorney testifying has no pertinence here. The affidavit of the undersigned concerned purely formal matters: identification of the patents cited by the Examiner during prosecution of the patent in suit, and listing a few prior patents not cited by the Examiner. These formal matters were undisputed; even Alan Franklin has never denied any of the statements in this affidavit.

Notice Given.

Franklin, without legal basis, argues that the Shanzer patent should not have been considered by this Honorable Court because it was not pleaded. Apparently he is not aware that 35 U. S. C. §282 provides that it may be in the pleadings "or otherwise in writing . . . 30 days before the trial."

Appellants' counsel acknowledged a copy of such affidavit on September 3, 1954, and so had notice of it in writing 30 days before trial.

Alan Franklin makes the misleading claim that the Shanzer patent is not an anticipation because it was not patented more than one year prior to the application for the patent in suit! This is not the law and never has been. He cites no authority in support of that statement—nor can he. Any prior patent which shows that someone else was an earlier inventor is a proper, lawful, anticipation. In *Milburn Co. v. Davis-Bournonville Co.*, 270 U. S. 30, 70 L. Ed. 651, the Supreme Court held that even a co-pending application is an anticipation if it were filed first. In the present case, the Shanzer patent was issued before Mrs. Syracuse applied for her patent in suit. Therefore, it is an anticipation.

The efforts to attack the Shanzer patent from different directions are an implied admission by Alan Franklin that it is a key reference, which it is. The very close pertinence of the Shanzer patent was gone into in Appellee's original Brief herein, and reference is made to same as though fully repeated at this point. This Honorable Court was fully entitled to say that the Shanzer patent, not cited by the Patent Office, requires invalidation of the patent in suit.

Nothing New.

Nothing new appears in any of Alan Franklin's four (so far) Petitions and Supplemental Petitions, over what he presented previously. He admits the several authorities cited down to the middle of page 6 (1) were all cited before. No new rule of law was pointed out in any of his papers; no new fact has been brought out. They all merely re-hash what he said before.

There was no genuine issue as to any material fact in the court below. Issuance of the Shanzer patent on the date it bears was and is undisputed, and its subject matter is undisputable. There would be nothing to try in this case. Commercial success, of course, can play no part where the patent in suit is clearly anticipated by the Shanzer patent. Commercial success is used only in case of doubt. *Tipper Tie, Inc., et al. v. Hercules Fasteners, Inc.*, 105 U. S. P. Q. 182 (D. C. N. J. 1955).

Assess Damages Against Appellants.

It is respectfully requested that this Honorable Court assess damages against appellants for their frivolous, delaying Petition for Rehearing. The sum of \$1500.00 was assessed in the case of *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226, 67 L. Ed. 961, 964-5, for a delaying proceeding that was frivolous and without merit. It was based on a Supreme Court Rule that was similar to Rule 24 (2) of this Honorable Court. Said amount was assessed even though "the decree appealed from was not a money judgment", and even though it did not come "within the exact terms" of the rule.

Conclusion

It is respectfully submitted that no grounds have been stated in any of the Appellants' several papers, printed or unprinted, why a rehearing should be granted in this case. The record was carefully considered by this Honorable Court; the patent in suit is clearly anticipated by the Shanzer patent, which is not a "fake" patent [(2), p. 8]. Alan Franklin could not resist attacking viciously even an inanimate object in his announced path to "reform".

It is respectfully submitted that the Petition for Rehearing should be denied, and that damages should be assessed against appellants for their frivolous, delaying Petition for Rehearing.

Respectfully submitted,

C. G. STRATTON,

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WARNER, PERACCA & COWAN,

HENRY N. COWAN,

Of Counsel.

Docket No. 14801

In the
United States Court of Appeals
For the Ninth Circuit

BILL CORBETT, *Appellant*,

v.

THE UNITED STATES OF AMERICA, *Appellee*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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FILED

FEB 29 1956

PAUL P. O'BRIEN, CLERK

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In the
United States Court of Appeals
For the Ninth Circuit

BILL CORBETT, *Appellant*,
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THE UNITED STATES OF AMERICA, *Appellee*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

This case involves an appeal from a conviction for evasion of federal income taxes in violation of former Section 145(b), Title 26 U.S.C.

JURISDICTION

The jurisdiction of the District Court was based on U.S.C. Title 18, Sec. 3231. Venue of the District Court was based on Rule 18, Federal Rules of Criminal Procedure. The defendant was indicted on four counts for evasion of federal income tax by a Federal Grand Jury on August 1, 1952 (R. 3-6). Count One involved the year 1945, Count Two involved the year 1946, Count Three, the year 1947, and Count Four the year 1948. The defendant was arraigned on August 8, 1952, and pleaded not guilty to all four counts (R. 10 and 11). The defendant was tried and found guilty on Counts 1 and 2 (R. 13, 17) and judgment and sen-

tence were entered by the United States District Court for the Western District of Washington, Southern Division, on December 28, 1954 (R. 17-18).

Jurisdiction of this court is based upon U.S.C. Title 28, Sec. 1291. Notice of Appeal was filed in the District Court for the Western District of Washington, Southern Division, on December 29, 1954 (R. 20-21). Federal Rules of Criminal Procedure, Rule 37. Venue of this court is established by U.S.C. Title 28, Sec. 1294(1) and the fact that the defendant was convicted for an offense occurring in the Western District of Washington within this circuit.

STATUTES INVOLVED

The statute involved in this case is Sec. 145(b), Title 26, U.S.C. (1939) which states as follows:

“(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.”

QUESTIONS PRESENTED

1. Was there evidence, sufficient to take the case to the jury, that income was received by defendant and

not entered in the books in amounts exceeding the income restored by defendant to the books and tax returns in 1945 and 1946?

2. Did the testimony of a government agent purporting to trace items into deposit tickets in evidence constitute error where the deposit tickets were not in evidence nor in existence?

3. Does it invade the province of the jury for a revenue agent, purporting to make an accounting summary on the basis of the evidence introduced, to testify both orally and by exhibit, not on hypothesis but as proven fact, that defendant received certain income, when the records in evidence on their face show the contrary and his conclusion of receipt of income is inference or speculation from contradictory testimony which does not directly establish receipt of the income?

4. Was it proper, in a case where net worth is not involved, to introduce financial statements of defendant having no bearing on the issues and then put in a great mass of far removed, immaterial, prejudicial evidence in an attempt to prove the statements false?

STATEMENT OF FACTS

Defendant was indicted for income tax evasion on four counts for the calendar years 1945, 1946, 1947 and 1948, respectively (R. 3-5). Count Four for the year 1948 was dismissed by the Court (R. 827). Corbett was acquitted by the jury on Count Three for the year 1947 (R. 13, 1135). This appeal involves Counts One and Two, the years 1945 and 1946, for which defendant was

convicted and sentenced to two and one-half years on each count, the sentences to run consecutively, and a fine of \$5,000 on each count, together with costs (R. 13, 17, 18, 1135, 1154). The indictment for 1945 alleged that defendant's net income was reported as \$10,021.48, whereas it actually should have been \$23,359.07 (R. 3). The indictment for 1946 alleged that defendant's net income was reported as \$8,274.44, whereas it actually should have been \$26,759.01 (R. 4).

Prior to trial defendant demanded a bill of particulars specifying the items aggregating the claimed net income for each year (R. 6). This demand was denied (R. 9).

At the trial the government made no attempt to show any increase in defendant's net worth, but attempted to prove that specific items of income had been received by defendant and not reported. For the years 1945 and 1946, these items of alleged income grew out of the operation by defendant of the Claremont Hotel, Seattle, as an individual proprietor and were:

(1) That the income of the Claremont Hotel had, before being reported on defendant's tax returns in the years 1945 and 1946, been reduced by allowances crediting the guests' accounts on the books of the hotel when in fact the guests had actually paid the accounts (R. 796, 800).

(2) That some overnight rentals of rooms and cots by the night clerk in the years 1945 and 1946 had not been reported (R. 796, 799).

(3) That salary checks of \$350.00 received by an

employee named Newton had been delivered over to defendant in the year 1945 and that the employee had not received the benefit thereof (R. 796).

Defendant operated the Claremont Hotel as an individual in the last six months of 1945 and in 1946 (R. 261, 863). The hotel was operated in the first six months of 1945 by a corporation wholly owned by defendant (R. 261, 863).

Defendant maintained books and records for the hotel (R. 929-930). The Internal Revenue agents who audited these books testified that the bookkeeping system used was entirely adequate and would show the correct amount of tax if the entries made therein were correct (R. 761, 785-786, 812). Defendant's returns agreed with the books (R. 761).

Charges to guests at the Claremont hotel usually were entered on guest ledger sheets every night (R. 275-278, 596-600, 893-898). These charges were carried forward day by day in accumulated totals as accounts receivable, were transferred to a daily transcript and eventually went into the income reported on the income tax returns unless reduced by some offsetting entry. (R. 275-278, 596-602, 895-898, and Def.'s Ex. A-1 for illustration). The hotel had some transient guests, but many of the guests stayed there by the month (R. 865). During this period the defendant was attempting to transfer more rooms to a transient basis because of the higher return (R. 865, 867-871, 900).

When a guest made a payment on his account, he was credited with the payment on the guest ledger sheet

(R. 145-148, 342-343), and the payment was entered on a daily cash sheet (R. 145-148, 342-343). There were instances where the guests did not pay the charges entered against him on the ledger sheet, including instances of bad debts, adjustments on his account, and free lodging (R. 330, 626, 859, 909-913).

Where guests were given credit on the guest ledger sheet for amounts that they did not pay, pink allowance slips (entitled "guest credit slip") were prepared showing the amount of the credit and these slips had to be okayed by defendant (R. 618-619, 626). They were then entered on the guest ledger sheet as a credit to the guest and as an allowance (R. 289-290).

A guest remaining six days at times received the seventh day free (R. 228), and sometimes permanent guests received a 31st day free (R. 454-455). Employees, as well as certain notable or entertainment personalities, were given free lodging (R. 355-356, 389, 787, 884-885, 906, 909). Newton, who had been a clerk at the hotel, testified a number of times that there were actual bona fide allowances (R. 411, 434, 472). Harold Vowles, who had been night clerk and night auditor, testified that there were valid allowances (R. 626). Bernice Morgan, who had been a clerk, testified that allowance slips where there was an erasure represented money that was supposed to be paid back to guests on an adjustment (R. 162). Beatrice Murta, who had been the bookkeeper, testified that the allowances could be bad debts (R. 330). All of these witnesses were government witnesses.

Myrtle Cole and Anna Chapman, two permanent

residents of the Claremont hotel for many years, testified their monthly bills during this period would show a charge far in excess of the amount actually paid, which was the O.P.A. ceiling, and that an allowance would be given which would reduce the bill to the amount actually paid (R. 873-874, 877-879). They often paid their bills on this basis to Loretta Newton (R. 875, 879).

Various witnesses including defendant testified that defendant had prepared or caused to be prepared allowance slips in some cases where the guest had actually paid his entire bill, including the amount of the allowance (R. 350-354, 601-602, 618-619, 912-917). On the basis of these slips, the clerks made the same entries on the guest ledger sheets that they made in the case of any other allowance, that is by crediting the guest and showing the amount as an allowance (R. 349-354, 361-364, 548 et seq.). The effect of these improper allowance slips was to reduce by the amount thereof the income which would otherwise have been reported on defendant's returns (R. 284-285, 300, 605, 775).

Government agents McCarthy and Marx had segregated some of the guest ledger sheets and allowance slips of the hotel into groups (R. 749-750, 766) and these groups were introduced in evidence as plaintiff's exhibits 13, 14, 15, 16, 17, 46, 47, 49, 51, 64, 72-A, B and C and 73-A B and C.

Nineteen former guests of the hotel testified that they had paid their bills and received no actual allowances (R. 485-540). In each of these cases defendant had

caused to be made an allowance slip showing part or all of the amount of their bill as having been allowed to them rather than paid. The total of the allowances so testified to was \$26.50 in 1945 and \$962.50 in 1946. (See Appendix A)

Bernice Morgan a clerk, identified on guest ledger sheets introduced as plaintiff's exhibit 13 certain guest accounts which she recognized as having been paid because of entries to that effect by her which had been erased and allowances entered (R. 157-169). The allowances totaled \$752.26 for 1946. (See Appendix B)

Loretta Newton, a clerk, was shown a group of guest ledger sheets which had been segregated by the government agents and marked plaintiff's exhibit 15 (R. 399). She identified certain specific ledger sheets as having been paid, although allowance slips had been written for these accounts, and testified that generally she had never given an allowance where the money had not already been paid (R. 355-363, 464, 477). The specific items testified to totaled \$520.58 for the year 1946. (See Appendix C). Two additional guest ledges tickets totaled \$125.93 for the year 1946 (R. 464-465, Pltf.'s Ex. 51). (See Appendix C). Newton also introduced a note book which she had kept (Pltf.'s Ex. 45), listing certain allowances which she entered on the records in 1946 although they had been actually paid by the guests, and introduced hotel guest ledger cards concerning these same accounts (R. 367-369). These totaled \$258.58. (See Appendix C). The total of the above items (Pltf.'s Ex. 46, R. 371) for the year 1946 was \$904.39. She testified that the book (Pltf.'s Ex. 45) included also pro-

per allowances which had been actually given to the guest (R. 411).

Irene Krueger, a telephone operator, identified a number of allowance slips that were partially in her handwriting (R. 210-224). She testified, however, that she did not know whether the guests received the benefit of these allowances (R. 213). As to one slip in the amount of \$110.75, marked "cash shortage", she testified that she had never been short in her cash (R. 213).

Harold H. Vowles, the night clerk, testified to two rooms where \$15.44 and \$47.14 had been paid but removed from the ledger sheet (R. 617-618).

An expert witness, Arthur W. Bauman, fumed and photographed some of the cash sheets used by the defendant's hotel (Pltf.'s Exs. 52-62) showing that some entries on these sheets had been removed (R. 546-547). Entries so removed from these cash sheets were in the same names and amounts and bore the same dates as allowance slips in evidence totaling \$566.64 in 1945 and \$388.91 in 1946 (R. 541-573). (See Appendix D)

The government called as a witness William F. Marx, who had been the Internal Revenue agent investigating the case, but who at the time of testifying was in private practice as a certified public accountant (R. 759-760). Marx testified that he had compared allowances in evidence with deposit tickets in evidence of the various personal bank accounts and the hotel accounts for the day after the allowance slip was dated, and attempted to find deposits of checks which agreed in exact amounts with the allowances (R. 766). Marx examined plain-

tiff's exhibits 73-A, 73-B and 73-C and testified that he had so traced certain amounts therefrom into the Bank of California and the National Bank of Commerce accounts of defendant for 1945 and 1946 (R. 771). However, there were no deposit tickets of the Bank of California in evidence or in existence for 1945 since they had been routinely destroyed by the bank (R. 132-133). Marx then totaled the allowances in plaintiff's exhibits 72-A, 72-B and 72-C (R. 772). Marx testified that in 1945 there were currency deposits in the various personal bank accounts totaling \$7,706, and in 1946 there were currency deposits in the various personal bank accounts totaling \$61,502.99 (R. 773-775).

Defendant testified that he had borrowed large sums from Mr. Birkland starting in June and July, 1945, in the amounts of \$75,000, \$49,000, \$50,000 (R. 925). Defendant also testified that during the period 1945 to 1948 he was borrowing heavily at various places (R. 925).

Some rooms and cots in the hotel were rented by the night clerk, Vowles, on a one-night basis where no guest ledger sheets were prepared, and part of these receipts were not entered on the cash sheet (R. 605-610). These night receipts not entered on the cash sheets did not, in the regular way, get into the income accounts of the hotel (R. 316-317, 607-608, 777). Vowles testified that he had kept a record from the time he commenced work in February, 1945, until July 1, 1947, of the night rentals not put through the books in the regular manner, and it was about \$7,200 (R. 611-612, 633). Also, at another point in his testimony, he estimated that the

night rentals could have run \$20 to \$30 per night (R. 611). Vowles testified that he commenced work for the hotel on February 7, 1945, and worked until December, 1947 (R. 596), and that the night rentals not entered on the books in the ordinary way did not continue through this entire period (R. 610). In both 1945 and 1946 when defendant was away on trips the night rentals were entered on the books in the ordinary way (R. 610). Former revenue agent Marx testified that it was possible that some of the rooms rented by Mr. Vowles, the night clerk, where no guest ledger sheets were created, went into the books (R. 788).

Loretta Newton testified that as a vice-president she received from the corporation operating the Claremont hotel during the first six months of 1945 salary checks totaling \$350 or \$360 (R. 383). She testified she returned these to the defendant (R. 383-384). The revenue agents stated that the salary was \$368.80 on which \$73.76 was withheld so that the checks totaled \$295.04 (R. 776). Defendant denied that these checks were returned to him (R. 942). The withholding on this amount went to Loretta Newton (R. 384).

Newton could not testify whether she received any of the \$350 salary as vice-president because she said she received some money of her own and didn't know whether it was all mixed up (R. 384). She received an income tax refund (R. 384).

During 1945 and 1946 the Claremont hotel was under O.P.A. rental regulations (Def.'s Ex. A-6, R. 627, 865-867, 923). Defendant had applied for increased rental

rates for his rooms, and this application was subsequently granted (Def.'s Ex. A-7, R. 867 and 886).

Defendant testified that he had restored to income on the books of the hotel the full amount removed or withheld from the books, whether by means of improper allowances or by the night clerk rentals, by causing the bookkeeper from time to time to record as income flat sums called "overages", "transient rentals", and other general designations (R. 899-905, 943-945).

The cash sheets (Pltf.'s Exs. 11, 12) and the transient rent journal (Pltf.'s Ex. 9), wherein entries were made from the cash sheets, contain items of cash income under the heading of transient rents, overages, cash shortages and the like, for which there are no guest ledger cards. The totals of these entries are as follows (Pltf.'s Ex. 9, Def.'s Ex. A-8; R. 903-905):

July, 1945-December, 1945	\$4,537.35
Jan., 1946-December, 1946	\$7,900.77

Mrs. Murta, the bookkeeper, testified that defendant from time to time gave her cash in lump sums which she put in the bank and added to income on the cash sheets (R. 269-270, 285, 313-314, 320). This was confirmed by the clerks (R. 269-270, 285, 313-314, 320, 404, Pltf.'s Ex. 11). Revenue agent Marx testified that he had found on the cash sheets lump sum additions to income totaling \$1,465.73 in 1945 and \$5,106.25 in 1946 (R. 763). The cash sheets show, however, lump sum additions to income in 1945 of \$1,665.73 rather than \$1,465.73 in the transient rent column as follows:

1945	<i>Entered by</i>	<i>Exact Words</i>	<i>Amount</i>
Aug. 18	B. Murta	"Cash over"	\$ 615.73
Sept. 12	B. Murta	"Cash" "Papers"	200.00
Oct. 7	B. Murta	"Various Guests" "Trans. Rent" "Cash"	250.00
Dec. 5	B. Murta	"Cash Shortage" "Cash"	400.00
Dec. 5	B. Murta	"Trans. Rent"	200.00
Total			\$1,665.73

In addition, there are lump sum additions to the "permanent rent" column of the cash received journal (Pltf.'s Ex. 9) in the following amounts:

July 3, 1945	\$105.00
August 3, 1945	105.00
November 15, 1945	200.00
Total	\$410.00

The lump sum additions to income in 1945 were, therefore, \$1,665.73 plus \$410.00 or a total of \$2,075.73.

Government witness Costello, who had been the accountant making up Corbett's 1945 tax return, testified that \$1,400 had been added to income as an additional cash item which he had placed under "wagering and other income" because he advised defendant it was better to place it in that category than as "cash over" (R. 683-684). An additional \$2,000 was put on the 1946 return in the same manner and under the same heading (Pltf.'s Ex. 3, R. 1039).

Government witness McCarthy identified financial statements which had been given by the defendant to the government agents, representing the defendant's financial position in 1938 and December 31, 1948, and these were admitted over objection (R. 739-740, Pltf.'s Ex. 71).

The government then introduced into evidence over objection financial statements which defendant had given to his banks (R. 741). These were statements to Bank of California, May 16, 1946 and May 15, 1947 (Pltf.'s Ex. 27); to the National Bank of Commerce, February 1, 1947 and November, 1947 (Pltf.'s Ex. 31); and statements submitted to the Peoples National Bank of May 15, 1947 and December 1, 1948 (Pltf.'s Ex. 38) (R. 741-747).

Testimony as to defendant's financial affairs between 1919 and 1938 and after 1948 was developed on cross-examination of defendant. This testimony is outlined in the argument.

SPECIFICATIONS OF ERROR

Appellant relies upon the following errors of the Court below:

1. The Court erred in denying defendant's motion for judgment of acquittal at the close of the case, since there was not sufficient evidence of unreported income to sustain a conviction on either count as a matter of law (Statement of Points, Nos. 2, 3, 16).

2. The Court erred in allowing government agents Marx and Holtberg to testify that on the exhibits in

evidence certain amounts could be traced to defendant's bank account when there were no such exhibits in the record (R. 759-827) (Statement of Points, No. 19).

3. The Court erred in allowing government agent Holtberg under the guise of giving an accounting summary to usurp the province of the jury by testifying that the evidence established receipt by defendant of certain income, whereas this was not established by any books or records but was contrary to them and was only Holtberg's inference from conflicting testimony. Plaintiff's exhibit 74 was offered containing these conclusions of Holtberg (R. 793). Defendant objected on the ground that it was incompetent, irrelevant and immaterial (R. 793) and that since the exhibit was said to be based on all of the evidence in the case, it left it too broad to determine upon what basis he made his computations (R. 795). The Court, without ruling on the objection, directed that a copy of plaintiff's exhibit 74 be passed to each juror and permitted Holtberg to testify orally as to each item therein (R. 795 et seq.). Later the Court admitted plaintiff's exhibit 74 (R. 825) (Statement of Points, Nos. 11, 19, 20, 21, 22).

4. The Court erred in admitting plaintiff's exhibit 71, a written statement given by defendant to agent McCarthy as to defendant's financial position in 1938 and December 31, 1948 (R. 739-740). Plaintiff's exhibit 71 showed net worth in 1938 of approximately \$110,950 and on December 31, 1948 of \$28,021.56. Defendant's objection was the "basic objection plus definitely now the objection that the Commissioner has not certified

any income tax deficiency authorizing this procedure" (R. 740). The "basic objection" was that an admission of defendant is improper, immaterial and incompetent until the corpus delicti was proved (R. 66). Statement of Points, Nos. 7, 17, 24, 26).

5. The Court erred in admitting plaintiff's exhibits 27, 31 and 38, consisting of financial statements given by defendant to banks as follows:

Exhibit 27—Statements to Bank of California as of May 15, 1947, February 1, 1947, and May 16, 1946 (R. 136).

Exhibit 31—Statements to National Bank of Commerce, Central Branch, as of February 1, 1947 and November, 1947 (R. 140).

Exhibit 38—Statements to Peoples National Bank as of May 15, 1947 and December 1, 1948 (R. 127).

Defendant objected to these exhibits on the ground that they were incompetent and immaterial (R. 127, 136, 141). The Court reserved ruling. They were reoffered after introduction of plaintiff's exhibit 71 (R. 740). Defendant renewed his objection (R. 741) but they were admitted (R. 741). (Statement of Points, Nos. 18, 26).

6. The Court erred in permitting the government to put into evidence (R. 970-973), through questions to defendant, the existence of and the contents of a petition for bankruptcy filed by defendant in 1925 (Pltf.'s Ex. 79 for identification), over the objection of defendant that it was immaterial (R. 970) and without admit-

ting the exhibit, the Court stating to government counsel (R. 971) :

“The Court: Before I admit the exhibits as a whole you can direct the witness’ attention to those portions you have in mind, * * *”

(Statement of Points, No. 12)

7. The Court erred in permitting the government to put into evidence (R. 985-987), through questions to defendant, the fact of and the details concerning a suit against defendant for a \$249 fuel bill in 1938 (R. 979-980; Pltf.’s Ex. 80 for identification), over the objection of defendant (R. 984) and without admitting the exhibit. (Statement of Points, No. 24)

8. The Court erred in permitting the government to read into evidence (R. 981-984), without having it marked or introduced, an affidavit of defendant in 1928 in which he stated that he was entirely without funds and asked welfare for his wife. Defendant objected to the reading from this affidavit on the ground that it was incompetent, irrelevant and immaterial and completely prejudicial having no reference to any issue in the case (R. 982-983). The Court stated (R. 983) :

“The Court: The portion relating to the statements made in the affidavit concerning his financial status at that time is admissable and may be referred to.”

(Statement of Points, No. 13).

9. The Court erred in permitting the government, over defendant’s objection that it was immaterial and the trial should be confined to the years involved (R. 992-993), to examine defendant concerning the amount

of income taxes he had paid since 1948 and the tax status of his sale of the Claremont hotel in 1951 (R. 991-994). Statement of Points, No. 14)

10. The Court committed plain error in permitting the government to examine defendant as to a large number of his financial affairs between 1919 and 1938 in an effort to show falsity in defendant's financial statement of 1938 (Pltf.'s Ex. 71) which was irrelevant and immaterial (R. 966-987). (Statement of Points, Nos. 23, 24).

ARGUMENT

While failing to establish that any income of defendant in 1945 and 1946 was unreported, the government improperly made the contrary appear to the jury by putting a revenue agent on the stand as an "expert" who usurped the function of the jury by asserting as proven fact that which was only his own personal interference. Also the government improperly prejudiced the jury by introducing irrelevant statements and attempting to prove them false.

This case involved the operation of the Claremont Hotel in Seattle. The issue, for the years 1945 and 1946 in which there were convictions, was whether defendant received income from night rentals, and income from guests in amounts which the guest ledger sheets showed as having been granted to the guests as allowances, which he failed to report on his returns. The evidence established and defendant admitted that some night rentals had not gone through the books in the ordinary way and that accounts re-

ceivable from guests on guest ledger sheets had been reduced by allowances in some cases where the guest had actually paid his entire bill. Defendant claimed that he had restored to income in each year the full amount of these items by lump sum additions to the books and tax returns.

A.

Insufficient Evidence on Receipt of Unreported Income To Take Case to Jury.

On the evidence introduced there was a reasonable doubt, as a matter of law, as to whether defendant had received any substantial unreported income, and the case should not have been submitted to the jury. In our discussion of this point it is important to bear in mind that the Claremont Hotel was operated by a corporation during the first six months of 1945 so that the night rentals and allowances involved are those for only the last six months of 1945 and for the entire year 1946.

1. Night Rentals

The only evidence as to the amount of night rentals not recorded in the books in the ordinary way was in the testimony of government witness Vowles. When asked to give an estimate of these rentals he said they might average \$20 to \$30 a night (R. 611). He stated, however, that this would not be for the entire period because whenever defendant was out of town Vowles put the night rentals through the books in the ordinary way (R. 611). He then testified that

he had kept a written record of these night rentals which were not recorded in the ordinary way, but had destroyed it when O.P.A. controls went off (R. 611-612). The total of this written record was about \$7,200 covering the period from February 7, 1945 to July 1, 1947 (R. 596, 612, 633).

The testimony as to the written record casts at least a reasonable doubt on any calculation based on \$20 per night, which, as we will show, was used by the government agents. If we multiply \$20 by 873 days, the period covered by Vowles' written record from February 7, 1945, to July 1, 1947, we would reach a figure of \$17,460, far more than double that of the \$7,200 total of the written record. Vowles' recollection of his actual written record is more to be trusted than his estimate, pulled out of the air, of \$20 to \$30 per night, particularly in view of his testimony that there were periods when defendant was on trips when these rentals were put on the books in the ordinary way, and the lack of testimony as to the time and duration of these periods. Vowles said that defendant was away for periods both in 1945 and 1946 (R. 610). Government witness Newton testified to one such trip in the latter part of 1945 but there was no showing as to the time defendant was away, although it appeared that the trip began sometime prior to November 15, 1945 and extended into 1946 (R. 386-389).

Even from the \$7,200 total of the former written record it is impossible to arrive at the amount for either the year 1945 or the year 1946 with the cer-

tainty required to sustain a conviction. For all that appears in the record the bulk of the \$7,200 could have been in 1947, a year for which defendant was acquitted. In a tax evasion case where each year is a separate count, the burden is on the government to establish what portion of this amount accrued during each separate year. *U. S. v. Altruda*, 224 F.(2d) 935, 938 (C.A. 2). We submit, therefore, that in determining whether there was sufficient evidence to take this case to the jury, no income from night rentals is properly to be considered.

2. Allowances

Defendant approved a large number of pink allowance slips (actually entitled "guest credit slips") during both 1945 and 1946 on the basis of which the clerks reduced the charges against the guests appearing on the guest ledger sheets.

No doubt was left by the evidence that some of these allowances were legitimate in the sense that the guests had received the benefit of them and the charges against the guests on the guest ledger sheets and the income of the hotel were properly reduced thereby. See Statment of Facts, *supra*. All of the government witnesses who had worked at the hotel testified that there were legitimate allowances. Nor was doubt left by the evidence that some of these allowances were illegitimate, in the sense that the guest had not received the benefit thereof but had paid his full account and the charges against the guest on the guest ledger sheets and the income of

the hotel were improperly reduced thereby. See Statement of Facts, *supra*.

In attempting to prove the amount of illegitimate allowances, the government introduced exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 64, 72 and 73, a number of allowance slips, some accompanied by guest ledger sheets and some not. As to only a portion of these allowances however, was evidence offered to show whether the guest did or did not receive the benefit of the allowance. Nineteen former guests testified they had received no benefit of allowance slips totaling \$26.50 in 1945 and \$962.50 in 1946. Bernice Morgan identified certain of the guest ledger sheets which she recognized as having been paid where there were allowance slips totaling \$752.26 in 1946. Loretta Newton testified to various specific guest ledger sheets as having been paid where allowance slips totaled \$100 in 1945 and \$904.39 in 1946. Irene Krueger testified that one slip for \$110.75 in 1945 marked "cash shortage" involved an entry in her writing and that she had never been short in her cash (R. 213). She mentioned some other allowances but stated that she did not know whether the guests had actually received the benefit thereof (R. 213). Vowles testified to two allowance slips of \$15.44 in 1945 and \$47.14 in 1946 where the guest had actually paid (R. 616-618).

During the testimony of Loretta Newton she was handed (R. 357) a group of ledger sheets, plaintiff's exhibit 15, which had been identified by agent McCarthy simply as a group of guest ledger sheets and

guest credit tickets (R. 106). Newton had previously testified that she had examined the cash sheets and guest ledger sheets for the Claremont Hotel and had "picked out the cash sheets with the ink eradications on them and where the allowances had been made in my handwriting on the guest ledger sheets" (R. 356). However, it developed on cross-examination that she had not picked them out but they had been segregated by the agents and then shown to her (R. 399).

The following testimony was given by Newton (R. 357) :

"Q. I will hand you Exhibit 15 which has been identified as ledger sheets of the Claremont Hotel during the years 1945, '46 and '47 and ask if you can identify those yourself?

"A. Should I go through all of these?

"Q. No, can you tell if those are the same ones?

"A. Yes, those are the same ones.

"Q. And do you know whether or not you showed Mr. Holtberg and were thereafter segregated and put in the condition they are now?

"A. Yes."

Inasmuch as Newton had previously testified that she had never given an allowance for room rentals or total charges to a guest ledger sheet where the money had not already been paid (R. 355), the government may contend that all of the allowances in the ledger sheets in plaintiff's Exhibit 15 had by this testimony been proved to have been received by defendant.

This testimony does not meet the exactness required

for conviction in a criminal case. The testimony shows that Newton did not examine the ledger sheets in plaintiff's Exhibit 15 when handed to her on the stand and she did not state definitely that each allowance thereon had been entered by her. She merely looked at the pile of sheets. She was merely assuming that the group handed to her was the same as some she had previously seen. There was no exact testimony by anyone as to who wrote on each of these sheets and what the particular entries represented. It appears from the cross-examination that the basic decision as to the handwriting involved was not made by her but by someone who did not testify.

As a matter of fact, in examining the ledger sheets comprising plaintiff's Exhibit 15 one finds that there are sheets where there are no entries under either cash or allowances, other sheets where no allowance entries appear but only entries of cash received, which the evidence showed was picked up as income on the books. While some sheets show erasures in the cash column and entries in the allowance column, others show erasures in the allowance column and entries in the cash column and others show no erasures at all. Moreover, the entries of allowances on these sheets appear to be in more than one handwriting. This confusion is highlighted by Newton's own testimony as to the very first sheet, where she stated that the allowance was not in her handwriting (R. 357) despite her basic testimony that she had picked out sheets where the allowances had been made in her writing.

We submit that this haphazard method of proof does not establish beyond reasonable doubt, for a specific item tax prosecution, that defendant received as income any specific amounts.

The government also put on witness Bauman who had fumed certain cash sheets to ascertain entries that had been removed by ink eradicator. Photographs of these cash sheets were introduced as plaintiff's exhibits 52 to 62 (R. 546-547). Bauman indicated that cash entries tying in with allowances had been made and erased in connection with guest charges totaling \$566.64 in 1945 and \$388.91 in 1946. Statement of Facts, *supra*. While this is not direct evidence of receipt by defendant of the money and still requires an inference by the jury, we have included these cash sheet entries among those as to which evidence of receipt was introduced in order to lean backward in the matter.

In the above evidence as to receipt by defendant of allowances, however, there were duplications of \$15.44 in 1945 and \$298.22 in 1946. See Appendix E.

In summary we find that there was some evidence tending to establish that defendant had received allowances in the following amounts:

<i>Witness</i>	1945	1946
Various guests	\$ 26.50	\$ 962.50
Bernice Morgan		752.26
Loretta Newton	100.00	904.39
Irene Krueger	110.75	
Harold Vowles	15.44	47.14

Arthur Bauman	566.44	388.91
	<hr/>	<hr/>
	\$819.13	\$3,055.20
Less duplications	15.44	298.22
	<hr/>	<hr/>
Total	\$803.69	\$2,756.98

There was no other testimony showing any additional allowance slips to have inured to the benefit of defendant except the testimony of revenue agent Marx now to be discussed.

3. Revenue Agent Marx improperly testified to conclusions from evidence not introduced.

At the outset of the trial defendant's counsel asked for exclusion of witnesses (R. 53). All witnesses were excluded except that three witnesses, agents McCarthy and Holtberg and former agent Marx were permitted to remain at the government counsel table throughout the trial on the representation that the testimony of Marx to a degree and of Holtberg entirely would be based on their continued presence in the courtroom (R. 83-86).

When Marx took the stand he was qualified as an expert certified public accountant (R. 759-760). After some preliminary matters he was asked if he had made a comparison of allowances with certain bank deposit slips in evidence. He replied that he had made analysis of the deposit slips of the various bank accounts in evidence to determine unidentified currency deposits. Government counsel then outlined the exhibit numbers of the deposit tickets in evidence and Marx stated that his analysis included defendant's personal

accounts but not the Claremont Hotel account itself (R. 764-765).

Marx was then asked if he had examined the accounts for other than currency. He testified that he had made a comparison of the deposit tickets and the allowance tickets to find individual check deposits corresponding to allowance slips (R. 766). He then read the date (July 2, 1945) and amount (\$15.00) of an allowance slip in plaintiff's Exhibit 73-A and stated that there was a check deposited to the Bank of California July 3 (R. 767). He asked if he should read all of the information on each ticket. The Court then stated (R. 768):

“Those exhibits are in evidence, Mr. Marx, so that anything that appears from them may be properly read.”

To the inquiry of defense counsel as to information concerning checks deposited to the Claremont account, the Court then said (R. 768):

“I am merely telling Mr. Marx anything that appears on those papers is already before the jury . . .”

Marx then read off allowance slips for 1945 totaling \$1,989.88 and as to each slip testified that there was a deposit in like amount in the following day in the Claremont Hotel account in the Bank of California. He testified to the total only of individual check deposits in the same bank in 1946 of \$269.91, where, he said, he had likewise traced the amount of specific allowance slips. He testified to the total only of individual check deposits in the National Bank of Com-

merce account of \$497.14 in 1945 and \$29.95 in 1946, where likewise he said he had traced allowance slips (R. 769-772).

As Marx then shifted from check deposits to currency deposits the Court stated (R. 774):

“Mr. Marx is merely making computations of exhibits that are already in evidence bringing out certain features about them that is proposed which is an entirely proper thing to do.”

The fact is that there were and are no deposit tickets at all in evidence for the Bank of California for 1945. The bank official, Hobart, testified that his bank had routinely destroyed all deposit tickets for that year (R. 132-133).

It is evident that while giving the Court and jury the impression that he was merely summarizing exhibits in evidence, Marx was, in fact, as to the \$1,989.88 identified by him as having gone into the Bank of California in 1945, testifying on the basis of information not in the record. While it might be that he had examined the deposit tickets prior to their destruction, there was no mention of this fact, no request to introduce secondary evidence and no opportunity to cross-examine on who gathered the information he was reading, the source of it, how thoroughly and accurately the information was prepared and like questions. As the record here stands there is no way the accuracy of the testimony given can be tested.

The importance of being able to test the accuracy

of the testimony is shown when the deposit tickets for 1945 in the National Bank of Commerce account, which are in evidence as plaintiff's Exhibit 29, are examined. Marx testified that he had matched \$497.14 in allowances on plaintiff's Exhibit 73 with check deposits listed on these 1945 National Bank of Commerce deposit tickets (R. 771). Yet examination of these deposit tickets with the allowances in plaintiff's exhibit 73 fails to disclose a single check deposit in the same amount as an allowance.

This testimony had an importance in the trial going far beyond the dollar amounts actually involved. It had a tendency to lead, and it is obvious that the government introduced it for the purpose of leading the jury to believe that as a general practice the allowances showed up in Corbett's bank accounts. Moreover it was the testimony as to the 1945 Bank of California deposits that stood out in this respect because each separate allowance and deposit was mentioned and the total was substantial while the accounts from other banks and other years were not substantial in amount and were not presented in detail. This testimony was followed immediately by testimony as to the total of currency deposits each year in the various bank accounts, the attempted inference obviously being that those allowances not traced into check deposits found their way into currency deposits.

The impropriety of testimony of a government agent based on material not in the record and the accuracy of which there is no opportunity to test by cross-examination is expounded in the case of *United States*

v. Ward, 169 F.(2d) 460 (C. A. 3). There a former agent of the Federal Bureau of Investigation summarized invoices which he said were unsupported by the testimony. It appeared that in reaching his conclusion as to which invoices were unsupported he relied on material outside the record, specifically information as to when ships were in port and information in sworn statements taken by the F.B.I. from a number of employees. The Circuit Court reversed convictions for conspiracy to defraud the United States saying (p. 462):

“ . . . Nor may expertness be the medium for injecting into the record material and information not a part of the expert’s qualifications and otherwise inadmissible through his lips.

“The effect of Johnson’s testimony was not simply to exclude ‘some government testimony.’ Rather it affirmatively declared the unreliability of records and witnesses on a basis neither accessible to the jury, nor assessable by it.”

Similarly at bar, Marx declared that substantial allowances appeared as deposits in defendant’s bank account in 1945 on a basis neither accessible to the jury nor assessable by it. The result, as the Third Circuit pointed out in the *Ward* case at 169 F.(2d) p. 463, is to give the jury an illegitimate premise for resolving the issue before it.

We submit that this testimony of Marx constituted reversible error, in and of itself, going to the entire case. We further submit that in any tabulation as to whether the government introduced evidence of in-

come not put through the books exceeding defendant's restorations to income, Marx's purported tracing of 1945 deposits should not be included. This applies not only to the 1945 Bank of California account but also to the 1945 National Bank of Commerce account where no tracing is possible to the deposit slips in evidence.

4. Lump sum restorations to income.

Government witness Murta, the bookkeeper, testified that Corbett from time to time gave her cash in lump sums that he called "overages" which she put in the bank and added to income (R. 269-270, 285, 313-314, 320). One of these lump sums was deposited March 20, 1946, and added to income on the cash sheet for March 19, 1946, in the sum of \$600 (R. 315-316), Pltf's. Ex. 11). Another in the sum of \$350 was pointed out by government witness Newton as added to income on April 28, 1946 (R. 404, Pltf's. Ex. 11).

Agent Marx testified that he had examined the cash sheets in evidence as plaintiff's exhibits 10, 11 and 12 and had found lump sum additions to income thereon totaling \$1,465.73 in 1945 and \$5,106.25 in 1946 (R. 763).

Examination of the cash sheets (Pltf.'s Exs. 11 and 12) discloses, as outlined in detail in the Statement of Facts herein, that the lump sum restorations to income in 1945 actually were \$2,075.73.

In addition, government witness Costello, the certified public accountant who had drawn up defendant's 1945 tax return, testified that defendant had him add

\$1,400 to income on that return as "cash over," which Costello put under the heading of "wagering and other income" (R. 683-684, Pltf.'s Ex. 67). A similar amount of \$2,000 was added to income on the return for 1946 (Pltf.'s Ex. 3, R. 1039). The books of account in evidence show that the lump sum additions in the cash sheets of \$2,075.73 in 1945 and \$5,106.25 in 1946 found their way into the gross rental income from the hotel on the 1945 and 1946 returns and are separate from and in addition to the \$1,400 and \$2,000 added directly on the 1945 and 1946 returns. The total restorations to income by defendant in 1945, therefore, were \$3,475.73, and in 1946, \$7,106.25.

5. *Newton's salary checks*

During the first six months of 1945 when the Claremont Hotel was operated by a corporation, Loretta Newton was vice-president of the corporation (R. 382). She received salary checks as vice-president which she estimated totaled \$350 or \$360 which she testified she returned to defendant (R. 383-384). Marx testified the salary totaled \$368.80 for the year 1945 from which \$73.76 was withheld so that the checks totaled \$295.04 (R. 776). Defendant denied that the checks were given to him (R. 942).

When asked whether she had ever received any of this income, Newton testified:

"Well, that is hard to say because I received some money of my own and I don't know whether it was all mixed up together." (R. 384)

Also she testified she received an income tax refund

from the withholding (R. 384).

There was no further showing that defendant received the benefit of these checks. The records of the corporation were not introduced so that it could be determined whether the checks were cancelled and the funds returned to the corporation. There was no evidence to show how much if any on account of these checks Newton had received mixed up with other moneys of her own.

In any event, the amount involved in these checks was so small, particularly in comparison with the unreported income asserted by the government in its summary on the night rentals and allowances, that it cannot be assumed that the jury would have convicted if this were the only issue submitted to them. Moreover, even adding the amount of these checks to income not put through the books, still the amount of such income does not equal the lump sum restorations to income, as we point out later.

6. Total income shown to have been received by defendant and not included in regular accounts did not exceed restorations to income.

Unless there was evidence on which the jury could have found beyond a reasonable doubt that substantial allowances and night rentals were received by defendant and not reported, the case should not have been submitted to the jury. When the evidence as above analyzed is considered together, it is evident that it does not support, beyond a reasonable doubt, a conclusion of unreported income. In fact, the

amounts established as having been received by defendant and not put through as regular bookkeeping entries were more than offset by the lump sum additions to income.

As pointed out above, allowances shown to have been deducted from income but as to which there was evidence that they were not actually received by the guests totaled \$803.69 for 1945 and \$2,756.98 for 1946. The 1945 allowance slips purportedly traced into deposits by Marx we do not add to this figure because based on material not in evidence or not traceable in the case of deposit slips in evidence. If we add, however, the \$299.86 traced by Marx into deposits in 1946 to the amounts above stated, we arrive at \$803.69 for 1945 and \$3,056.84 for 1946, as to which there is some evidence to sustain a determination that the guests had not received the benefit of the allowances.

Nevertheless, as pointed out above, the lump sum restorations to income on the cash sheets and income tax returns totaled \$3,475.73 in 1945 and \$7,106.25 in 1946, substantially in excess of the improper allowances so established. There was no evidence to contradict defendant's testimony that these lump sum additions were made to restore to income on his tax returns the amounts withheld or removed from the ordinary records. In fact agent Marx gave defendant credit for the restorations made on the cash sheets but for some reason Marx ignored the additional amounts added to the returns despite the fact that they were not a duplication of the income restored on the cash sheets.

We have not, in this comparison, added anything to income not regularly entered in the books by reason of night rentals. This is because, as above pointed out, there was no proper proof of the amount of these night rentals. Nevertheless, even if we add an amount based on the assumption that the \$7,200 total of these night rentals, as kept by Vowles on his written record, was received evenly month after month, there is still no unreported income shown. The figure of \$7,200 was for the period of February 7, 1945, to July 1, 1947, approximately 29 months (R. 596, 633). This would be approximately \$250 per month or \$1,500 for the last six months of 1945 and \$3,000 for the year 1946. Adding these to the allowance figures above mentioned of \$803.69 for 1945 and \$3,056.84 for 1946 we would get totals of \$2,303.69 for 1945 and \$6,056.84 for 1946, still under the restorations to income of \$3,475.73 in 1945 and \$7,106.25 in 1946.

While the government introduced as exhibits allowance slips totaling \$14,959.84 in 1945 and \$17,542.83 in 1946, it is speculation as to whether the allowances in evidence, other than those outlined above as to which there was specific evidence, actually inured to the benefit of the guests or whether they inured to the benefit of defendant and the case should not have gone to the jury for them to make such a speculation.

Myrtle Cole, public stenographer who had been a permanent guest in the years here involved testified that her bill would show a charge of \$158 or \$160 a month and then an allowance would be deducted which

brought it down to \$90 per month (R. 873-874). She paid rental for another permanent guest and it was handled in the same way (R. 875). She had paid her bill in this manner to Newton (R. 875).

Also Ethel Beers, who has resided at the Claremont for twenty years, testified that her monthly bill would contain a charge of \$183 or \$185 from which an allowance was deducted leaving a net which she paid, which during O.P.A. control was \$52.50. She likewise had often paid Newton on this basis (R. 877-879).

Examination of the guest ledger sheets in evidence discloses that a large number of the allowances, rather than constituting the amount of the bill of a guest checking out, as Newton's testimony would indicate, were of the type testified to by witnesses Cole and Beers—that is, they were credits on the accounts of long-staying guests, occurring during their stay rather than at a time of checking out, the credit being in an amount entirely different from the balance of the account on the day the credit was entered. The impression could be drawn from these ledger sheets therefore that the allowances represented reductions in the charges to long-staying guests to bring their actual payments in line with the O.P.A. ceilings. In this connection it is implicit in much of the testimony in the case that O.P.A. ceilings for long-staying or so-called “permanent guests” were less than for transient guests. If a guest started off at a particular rate per day and then stayed long enough to come under lower O.P.A. ceiling, a lump sum allowance of the kind found in the ledger sheets in evidence could be in

order so as to bring the rate charged from the beginning down to permissible levels. At the least we point out that there is nothing in the evidence which clearly prevents this as a possible inference in these instances.

Another indication of the unreliability of taking all of the allowance slips introduced as having inured to the benefit of defendant is that in spite of the testimony of Holtberg, to which we will later refer, that the allowance slips introduced contained no allowances to employees, plaintiff's exhibits 15, 72 and 73 in fact include \$229.45 in 1945 and \$861.82 in 1946 in allowances to the few employees mentioned by defendant in his testimony. See Statement of Facts, *supra*. There were 37 clerks alone in 1945 and 1946 (R. 896). On the basis of analysis of one month's allowances (July, 1946), defendant read a number of specific employee allowances from the allowance journal (Pltf.'s Ex. 9) and testified that allowances to employees would average \$1,000 per month (R. 907, 908).

On appraisal of all these factors it is evident that any conclusion that defendant received the benefit of the amounts of allowances not specifically proven to have been received by him is pure speculation. There is not, in the record, proof from which a jury could find, beyond a reasonable doubt, that any of these allowance slips beyond those actually so proven were income of the defendant and the Court below should have sustained defendant's motion for judgment of acquittal at the conclusion of the trial.

B.**Exhibit 74 and Testimony of Agent Supporting it Usurped the Function of the Jury.**

Even if there were sufficient evidence properly to take the case to the jury, nevertheless the issue as to whether defendant received unrecorded income in an amount greater than the income restored to the books and returns was one to be decided by the jury and the jury alone. Agent Holtberg, however, was permitted to testify both orally and by means of government's Exhibit 74 in a manner that usurped this exclusive function of the jury. He drew the speculation or inference as to the receipt of allowances and night rentals himself and despite the fact that his conclusions were his own personal opinion or perhaps, more accurately, were the government's contentions, they were given to the jury as if they were established fact.

Holtberg was, as we have pointed out, permitted to remain at government counsel table throughout the trial. He was the final witness for the government. He testified that he had heard all of the evidence introduced at the trial and from this evidence he had computed the net income and tax due thereon for the defendant for the years involved (R. 793). He identified a computation of this net income and tax (Pltf.'s Ex. 74 reproduced as Appendix F to this brief). Despite defendant's objections to this exhibit (R. 793, 795), duplicate copies were passed out to each juror (R. 795), even before it was admitted. It was later admitted (R. 825) and was sent to the jury room (R. 1130).

In his testimony and in plaintiff's Exhibit 74 Holtberg stated that on the basis of the documents and testimony in evidence which he had heard while sitting at the trial (R. 793, 794), there was unreported night rental income for 1945 of 184 days at \$20 a day, or \$3,680, and for 1946 of 365 days at \$20 a day, or \$7,300 (R. 796, 799). He likewise testified that there were allowances restored to rental income for 1945 of \$14,959.84 and for 1946 of \$17,542.83, these being the total of all allowance slips introduced in evidence (R. 797, 799). On this basis he testified that there was a tax deficiency of \$4,120.45 for 1945 (R. 798) and \$3,922.59 for 1946 (R. 803).

On cross-examination defendant's counsel tried to bring out that these conclusions of Holtberg were based on speculation and were not a computation based on income proved to have been received by defendant. He drew the admission from Holtberg that to the extent that an allowance in the documents in evidence was a legitimate allowance in which no cash came in, the item would come off his allowances (R. 809). Also Holtberg admitted that any cash recorded in the books from night rentals would come out of his computation and he said he recollected Vowles' testimony that the total of the memorandum Vowles kept was \$7,200.00 (R. 808).

On redirect examination, however, Holtberg testified (R. 821):

“Q. Were any allowances to guests, to employees in any way included in the figure you have used?

“A. No, sir.”

Also he testified on recross-examination (R. 822-823):

“Q. Do you know whether or not the documents in evidence, as you say, where allowances were made, cover the rooms occupied by employees?”

“A. They do not.

“Q. They do not?”

“A. The documents in evidence do not include —the guest ledger sheets in evidence do not include the allowances to employees.”

Moreover, on redirect examination Holtberg testified with reference to the total allowances contained in the allowance journal of the hotel in comparison with the lesser total of the allowance slips introduced in evidence, which Holtberg used for his computation, in such a manner as to make it appear to the jury that all allowances where employees or guests had actually received the benefit had been taken out and that Holtberg had used only allowances as to which the proof left no question that defendant and not the guest or an employee had received the benefit (R. 817-822).

With regard to the computation of unreported night rentals at \$20 a day, Holtberg testified that he was using the testimony of Mr. Vowles as computed by Mr. Marx (R. 796). Marx testified as follows (R. 777):

“A. (Continuing) As I recall Mr. Vowles’ testimony he stated that on an average that five to

six rooms were rented each night and not recorded, and that he would estimate the amount to be between \$20 and \$30 a night. Now I have made a computation based on this minimum estimate feeling that——

“The Court. Regardless of what you felt about it you took his minimum?”

“The Witness. That is correct.

“A. (Continuing) In 1945 from July 1 to the end of the year we have 184 days at \$20 a day or a total unreported income of \$3,680. For the year 1946 we have 365 days at \$20 a day totaling \$7,300 in unreported income. . . .”

Thus on the two issues heretofore discussed as to which if there were to be a conviction, it was necessary for the jury to infer that defendant received amounts of income in excess of restorations (our basic position being that what would be required would be not an inference but a speculation), Holtberg, with the assistance of Marx, in effect took these crucial issues away from the jury and made it appear unnecessary for the jury to try to recall the basic testimony and exhibits to determine for themselves whether defendant did or did not receive such income. Holtberg specifically told the jury that the total of the allowance slips in evidence which he had used for his figures, did not include any allowances to guests or employees. If not, then it appeared that defendant and not guests and employees had received the benefit of these allowances so that it was not necessary for the jury to give the matter any further thought.

In thus making his own inference appear to the jury as established fact, Holtberg testified not only improperly but also incorrectly. While it is not possible on this record to determine how much of the allowances benefited the guests and employees and how much benefited defendant, it is clear that the allowance slips used by Holtberg included allowances to employees, as previously pointed out.

Moreover, as to Mr. Vowles' testimony on the night rentals, we have heretofore mentioned that to take \$20 a night for every night is entirely improper because Mr. Vowles' testimony indicated clearly that all of the night rentals were regularly put on the books during periods of time, the length of which the government did not show, and for the further reason that Mr. Vowles' written record casts substantial doubt on the accuracy of this estimate of \$20 a night. Yet not only agent Marx, but the Court itself, in the above quotation from the record, in effect tells the jury that \$20 a night is the minimum that defendant received on account of these night rentals.

There is, of course, a proper function to be performed in criminal prosecutions for tax evasion by expert revenue agent accountants in summarizing entries in complicated books of account and other evidence. The Supreme Court has so held in *United States v. Johnson*, 319 U.S. 503, 87 L. Ed. 1546, and this Court has recognized the field for such testimony in two recent cases. *Barcott v. U.S.*, 169 F.(2d) 929 (C.A. 9), and *Gendelman v. U.S.*, 191 F.(2d) 993 (C.A. 9).

Where such testimony is offered without hypothetical questions the courts have been careful to analyze the type of summary testimony given by the agents to make certain that the province of the jury is not usurped. Particularly has this been so in recent years with the very large increase in the number of tax evasion prosecutions, and since the Supreme Court in *Holland v. United States*, 348 U.S. 121, 127-128, 99 L. Ed. 150, 160 (1954), so cogently pointed out the danger in these cases:

“ . . . where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.”

The Third Circuit in *United States v. Ward*, 169 F(2d) 460 (C. A. 3) has, as we have previously mentioned, held that an agent testifying as an expert may not usurp the exclusive function of the jury to weigh the evidence and determine credibility, by testimony in which he makes use of materials not in evidence and accepts some witnesses' testimony and rejects others as “uncertain.”

The Fifth Circuit in *Steele v. United States*, 222 F. (2d) 628 (C.A. 5), a net worth tax evasion prosecution, reversed the conviction because of the summary testimony of the expert agent. The objections to the testimony and the exhibit prepared by the agent was that there were omissions, interpretations and discrepancies between the record and these exhibits and that

the agent did not merely attempt to summarize the testimony, but on the contrary, undertook to evaluate it, endeavoring to pass upon the reliability and credibility of certain witnesses, and to determine what weight should be given to their testimony. The Court stated that it was not under any circumstances proper for these compilation exhibits to be taken to the jury room, and further pointed out that the case was not a simple and uncomplicated case where summaries would be proper. The same Circuit in *Lloyd v. United States*, 226 F.(2d) 9 (C.A. 5), found it unnecessary to decide whether the testimony of the agent summarizing the case was reversible error since the case was being reversed on another ground. Nevertheless, the Court stated (p. 17):

“The use of this type of evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness chart computation, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a ‘trial by charts,’ however impressive the array produced. . . . Whenever possible such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses,”

The Second Circuit in *United States v. Altruda*, 224 F.(2d) 935 (C.A. 2), reversed a conviction for tax evasion on the ground that the exhibit filed as a sum-

mary by the expert agent did not take into account important facts shown by the government's own evidence. The Court stated (p. 942):

“It was not an analysis of the net worth increase or a computation of fraudulently unreported income which conformed to the government's evidence, and it did not fully state the facts.”

It is evident that the courts, as these tax evasion cases multiply, while continuing to permit the summary testimony by accounting experts representing the government, are examining that testimony carefully to make certain that it is what it purports to be, merely a summary of actual facts and figures in the record and facts and figures which, at least on the government's own presentation, are not seriously in doubt. Unless the testimony is presented on hypothetical questions which warn the jury of the inferences or assumptions being made, this type of testimony can be exceedingly unfair and damaging to a defendant because the jury is apt to take the testimony as factual evidence of the conclusions stated.

In the case at bar, Holtberg was qualified as a certified public accountant and could properly testify as an expert on any accounting problem. He could properly have testified to the totals of the allowance slips and ledger sheets introduced, and if he wished to divide them into categories based on some difference in the entries on them, then he could have given the totals for each category and could have described them. He could also properly trace entries through the books. If asked what the tax would be if the jury

were to find that the amount of all allowance slips introduced had actually been paid to defendant and none of them had benefited the guests or employees, he could have computed the figure.

The question of whether the guests and employees or the defendant received the benefit of the allowance slips introduced was not, however, an accounting problem. There was nothing that could be extracted by an accountant from the books, records or testimony which would resolve this question. In fact, as far as the accounting records went, they showed that the guests received the benefit of all of these allowances. If Holtberg were really testifying as an expert accountant and confining himself to that which the books and records disclosed to an accountant, he would have had to testify that the records showed that the guests received the benefit of the allowances. When he told the jury, both by his exhibit and by positive oral testimony, that neither the guests nor the employees received the benefit of any of these allowances, he was not testifying as an expert accountant summarizing books and records, but he was speculating or making an inference or drawing an opinion of his own. He was generalizing so as to apply to all of the allowances the conclusions that he drew as to some of the allowances from the testimony of some of the witnesses. In so doing he ignored the testimony of all of the witnesses that, along with the giving of improper allowances, there was likewise the giving of proper allowances where the guests and the employees actually received the benefits thereof.

What happened here is no different from calling a witness in a murder case where the prosecution's proof showed some circumstances indicating that the accused committed the murder, and other circumstances indicating that someone else committed it, and having the witness testify that he was an expert on crimes, that he had listened to all the evidence, and that it was proven that the accused committed the murder. This would be a clear invasion of the province of the jury. Yet here, also, the government contends there are some circumstances that could be taken as indicating that defendant received the benefit of these unproved allowances. There are other circumstances indicating that the guests and employees might have received the benefit. The government put on a witness who testified that he was an expert on accounting, that he had listened to all the evidence and that it was proven that the defendant had received the benefit of all of these allowances and that the guests and employees had received none of them.

The prejudicial effect of this testimony is very great. It was strongly impressed upon the jury by the distribution to the jurors of duplicate copies of plaintiff's Exhibit 74 during Holtberg's testimony. This was not done, as far as we can determine, in the case of any other exhibit. The exhibit was sent to the jury room where it constituted the only summary of the case before the jury. Moreover, this testimony enabled the government counsel in his argument to the jury to state (R. 1057-1058):

“Now these allowances were totaled up by Mr.

Holtberg and I believe explained to you and they totaled, the entry charged back in each year \$14,900, allowances in the Claremont Hotel in 1945, and they were taken from these allowance slips attached to the ledger sheets. . . . That is in there and all of these where there is positive identification and not subject to any claim of legitimacy of allowance for employees or anything else. That is \$14,900 in 1945, \$17,500 in 1946 and \$4,519 in 1947."

As we have above shown, the \$14,900 in 1945 and \$17,500 in 1946 was not proved to have been received by defendant. Only a small portion as above set out was actually identified in this respect whether by Mrs. Newton or by any of the other witnesses. Even if Newton's general testimony about plaintiff's Exhibit 15 were thought to be evidence that defendant had received the benefit of those allowances, it still would not reach anything like Holtberg's totals. The \$14,900 and the \$17,500 figures are totals of all the allowance slips in evidence, namely plaintiff's exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 72 and 73 (R. 797).

We cannot think of any better way to take a crucial and doubtful issue from the jury. The unfairness to the defendant which resulted was not in any way corrected by the Court below. In fact, during the examination of Holtberg, the Court by its own questions emphasized to the jury that the income testified to by Holtberg was the minimum that there could be on the evidence introduced. The Court stated (R. 801):

"Let me see if I understand it. From the figure \$24,842.00 you have deducted or taken out all items

as to which there is no evidence indicating that it was not a proper charge, is that in effect what you mean? Or to put it another way, the remainder of \$19,736.00 is the total of all the items as to which there is evidence indicating that the item was not properly carried, is that correct?

“Witness: That would be the net minimum figure, yes.

“The Court: Is that clear to all of you?”

Nor did the Court below clear up the matter in its instruction as to this summary, which was (R. 1124-1125):

“There have been admitted in evidence certain exhibits, variously referred to here as schedules or summaries. Strictly speaking these exhibits are not received as evidence themselves, but are admitted as a summary of the evidence admitted in the case and the summaries are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents, but you are reminded that it is the books, records and documents which are the evidence and the summaries are admitted only to assist you in considering the evidence, and for that purpose you are entitled to consider them.”

This instruction intimates that Holtberg's Exhibit 74 is an actual summary of the evidence admitted in the case and is based upon the books, records or documents. There was no pointing out to the jury that it was based on an inference which Holtberg saw fit to

draw from conflicting general evidence and was, in fact, contrary to the actual records and books. There was no indication in this instruction that, after Holtberg's testimony, the jury still had to go back to the basic testimony and exhibits to determine whether defendant had received income represented by allowance slips which exceeded his restorations to income.

Nor did the Court's instruction with regard to expert witnesses cure the matter. The instruction was (R. 1128-1129):

"In this case certain persons including government agents and accountants qualified as experts and testified. When a person is called as an expert witness in a particular field of knowledge or learning and is allowed to express opinions, those opinions are for the aid and assistance of the jury but not for the purpose of invading the jury's function. The testimony of an expert witness in so far as it is based upon his personal observations of particular facts and conditions is to be considered by you just the same as that of any other witness but the opinions of experts based on hypothetical assumptions of fact do not tend to prove the facts upon which they are based.

"The jury is not bound to find according to expert testimony, but it should be considered by you in connection with all the other evidence in the case. The responsibility to decide rests upon the jury and it is your duty to evaluate and appraise the testimony of the witness who expresses an opinion precisely as you would evaluate and appraise the testimony of a witness who testifies to facts within his personal knowledge.

“It is for you in the light of all the circumstances disclosed during the progress of the trial to place that weight upon and give that credit to the testimony of each witness whether an expert or otherwise, which you conscientiously believe in the exercise of sound judgment and good sense it is fairly entitled to receive at your hands.”

Since there was no indication that Holtberg’s positive testimony as to receipt of income by defendant was based on hypothetical assumptions of fact, and certainly the argument of government counsel did not so indicate, the purport to the jury of these instructions would be that Holtberg’s testimony was to be given the same consideration as that of any other witness. His testimony in this regard was not clearly opinion testimony, and there was nothing in this instruction that apprised the jury that Holtberg’s testimony was simply his inference and that they still had the duty of deciding what if any inferences they themselves should draw.

The entire manner in which these cases are tried emphasizes the cautionary note sounded by the Supreme Court in *Holland v. U. S.*, 348 U.S. 121, 99 L. Ed. 150 (1954), where it took pains to reiterate the necessity of making certain that defendants in tax evasion cases receive fair trials. Defendant here, for example, had interests in two hotels and other properties during the years involved. Myriads of rentals to guests and other transactions were involved. The indictment merely alleged that he had understated his income. A motion for a bill of particulars before trial was denied (R. 8.). The books and records had been in the pos-

session of the government for the entire four years prior to trial (R. 99). Thus the defendant in this, as in most of these cases, started trial not knowing exactly what matters the government would rely upon. Even during the evenings and the one weekend of the trial, the books and records were, a large part of the time, in the hands of the government (R. 143, 425, 703, 753-754, 1029). There is little time during the trial for a defendant to prepare from voluminous records of this sort an adequate defense in a case where the government introduces and relies upon a great volume of small transactions. Even if the defendant had been able to get access to the books before trial, in the absence of knowledge of the points being relied upon by the government, he would have been faced with an insuperable obstacle. Had he wished to prepare himself to meet a possible attack on allowances, he would have had to contact thousands of witnesses scattered all over the United States, whose present addresses were unknown.

The trial situation in a case like this is one in which fairness requires that the government be held strictly to proof that the defendant did receive the benefit of the allowances given by the hotel during this period, and, further, fairness requires that, if any inferences are to be drawn going beyond the strict proof, the jury be permitted to draw those inferences from the facts and evidence properly introduced without having a revenue agent testify positively that no inference was required, that the income was proved to have been received by defendant and without having that con-

clusion reinforced by the placing in the hands of the jury of a written exhibit, showing totals as being fully established.

We submit that the testimony of Holtberg, assisted by Marx, invaded the province of the jury and withdrew the crucial issue in the case from the jury, and that this constituted plain and reversible error.

C.

Financial Statements and Evidence Based Thereon Were Improperly Admitted.

As a part of the government's case, agent McCarthy identified statements of defendant's financial position in 1938 and on December 31, 1948, supplied by defendant to the agents (R. 739, Pltf.'s Ex. 71). The Court below admitted these over defendant's basic objection, which was that the documents were incompetent, irrelevant and immaterial until the *corpus delicti* was established (R. 66, 740). Since the government did not proceed on a net worth basis, the *corpus delicti* to justify the introduction of this exhibit was never established.

The issue here was whether allowances and night rentals in 1945 and 1946 were received and unreported. While at the time these exhibits were introduced the years 1947 and 1948 were also then involved, the issues for those years likewise dealt with receipt of specific items of income. Defendant's financial statements in 1938 and 1948 had no relevance to these issues unless the government intended to and was prepared to trace the amounts of his net worth for each year and show

unexplained increases in this net worth in the years in question, which would be some indication that defendant had received the disputed income. The government made no attempt to do this, so that the independent corroborative evidence required to permit introduction of admissions of net worth was never introduced. *Smith v. United States*, 348 U.S. 147, 156, 99 L. Ed. 192, 75 S. Ct. 194 (1954); *United States v. Calderon*, 348 U.S. 160, 163, 99 L. Ed. 202 75 S. Ct. 186 (1954).

The purpose of the government in introducing these financial statements was made clear in the opening statement (R. 52-53). This purpose was to make it appear to the jury either that these financial statements were false or that certain financial statements given to banks and certain statements made in documents in the 1920's and 1930's were false.

Immediately after offering and securing the admission of plaintiff's Exhibit 71, the government re-offered exhibits 27, 31 and 38 and secured their admission over the renewed objection of the defendant that they were incompetent and immaterial (R. 127, 136, 141, 740-741). These exhibits were financial statements given by defendant to banks in Seattle in the years from 1945 to 1948. Government counsel then read at length to the jury plaintiff's exhibits 71, 27, 31 and 38 (R. 741-747). The purpose was to show the difference in net worth between the statement submitted to the agents and the statements submitted to the banks.

The statements to the banks did not disclose any additional assets of material nature over those disclosed

in the statement to the agents. Giving allowance for the difference in dates of the statements, the same assets are there but they are valued on an entirely different basis. The statement to the agents (Pltf.'s Ex. 71) is on a cost basis. The statements to the banks are on asserted fair market value. For example, plaintiff's Exhibit 71 shows the Claremont Hotel plus furniture and automobiles at a cost on December 31, 1948, at \$305,541.08. Plaintiff's Exhibit 38, the financial statement submitted to the Peoples National Bank as of December 1, 1948, the closest one to December 31, 1948, showed the Claremont Hotel plus furniture, but not including automobiles, at a fair market value of \$1,500,000. See R. 758-759, 933-934. Since fair market value is anybody's guess, there was certainly nothing in the fact that defendant put a large fair market value on his property in his statements to the banks that is in any way relevant or material to the issues involved in this case. Another vital difference between these financial statements is that on the financial statements to the banks defendant omitted some of his liabilities. In the statement to the agents of December 31, 1948, there is a careful listing of all of his liabilities. The fact, however, that defendant would file statements with the banks as to his financial position without listing all of his liabilities likewise was not sufficiently similar in kind to be proper evidence that the precise items of income involved in this case were received by defendant and were not reported.

On cross-examination of defendant the government went even further afield. Defendant was questioned

concerning statements made by him to agent McCarthy that he had as much as \$40,000 by 1920 (R. 966-967); concerning his employment in the post office from 1920 to 1924 at \$1,600 per year (R. 967); concerning \$6,500 in old coins accumulated prior to 1920 and appearing on the 1938 financial statement (R. 969, 980); concerning \$9,000 left with his father in 1919 (R. 969) and concerning a petition in bankruptcy filed by him in 1925. The petition for bankruptcy was marked as plaintiff's Exhibit 79. Defendant's counsel objected on the ground of immateriality (R. 970). The Court, without admitting the exhibit, permitted government counsel to read the contents of the bankruptcy petition to the jury in the form of questions, requiring defendant to admit the filing and contents of the petition (R. 970-973).

Defendant was then questioned concerning the whereabouts in 1925 of assets listed in his 1938 financial statement as accumulated prior to 1925 but not listed in the bankruptcy petition (R. 973-974). Defendant testified that old coins had been lost in an old trunk and that his father, with whom he had placed \$9,000, had disappeared (R. 974). Defendant was questioned as to how he had earned the \$9,000 between the time he was 14 and 17 years of age (R. 974), as to how he earned \$16,000 to give to his mother in 1920 (R. 975), and as to how the money came back from his mother after her death in 1943 (R. 976).

Defendant was then questioned as to a loan he stated he made to Carl Baron in 1927 of \$5,000 and as to how he had secured the money (R. 977); as to a loan to Al

Crock of \$5,000 in 1938 (R. 977); as to sale of household goods in 1938, 1939, 1940 and 1941 in Oklahoma City for \$8,500 (R. 977); and as to guns listed on his 1938 financial statement but not on his 1925 petition for bankruptcy (R. 978).

Defendant was then questioned as to the number of lawsuits he had been in (R. 978-979, 988), and particularly as to a suit against him in 1938 by the Bell Fuel Company for a \$249 fuel bill (R. 979). The judgment in this case was marked as plaintiff's Exhibit 80 (R. 980) but excluded (R. 1004) because government counsel had brought out all the facts through questioning (R. 985-987) as permitted by the Court after objection by defendant's counsel to plaintiff's Exhibit 80 (R. 984-985). Government counsel by his questions brought out that this judgment was at the same time that the 1938 financial statement indicated defendant had substantial amounts of cash (R. 987).

Defendant was asked to identify his signature on an affidavit in 1928 in which he stated that he was entirely without funds and asked welfare aid for his wife. After defendant's objection to reading from this document on the ground that it was incompetent, irrelevant and immaterial, completely prejudicial, and having no reference to any issue in the case, the Court permitted the affidavit to be read to the jury without being marked or introduced (R. 981-984). Defendant was again questioned about his loan of \$5,000 to Baron in 1927 (R. 984).

Defendant was questioned as to borrowing \$300

from his mother in 1938 and about a mortgage on a trailer taken by his mother as security (R. 984-987).

Defendant was then questioned about his business transactions after 1948, including trades by which he acquired stock in some Idaho banks, an interest in a hotel and property in Santa Barbara, and a theatre and beach home in Cheney, Washington (R. 987-991). He was questioned about the amount of income taxes he had paid since 1948 and in connection therewith the status of the capital gains tax payable on his sale of the Claremont Hotel in 1951, defendant stating that his accountant had advised that there would be a tax of \$200,000 payable as defendant received installments of the purchase price but government counsel attempting to make it appear that he had failed to pay his proper tax (R. 991-994). Objection by defendant's counsel that defendant's taxes after 1948 were immaterial and that the trial should be confined to the years involved was overruled (R. 992-993).

Defendant's income tax returns for the years 1940-1943 were read in detail to the jury (R. 949-964) and the tax he paid each year, including 1949, was outlined (R. 992).

In a tax evasion case based on net worth, the government properly may go into detail as to the defendant's assets and liabilities for years long prior to the indictment period if they bear on the beginning net net worth for the period under consideration, and thus have a relevancy to the case. Where the prosecution is on the basis of the receipt by the defendant of cer-

tain specific items of income in the particular years, however, the assets and liabilities of the defendant and his statement concerning the same for years far removed have no relevance and introduction of such evidence is error.

In *Wolcher v. U. S.*, 200 F.(2d) 493 (C.A. 9), a tax evasion case, this Court pointed out that, to be admissible, prior wrongful acts must be similar to the one now charged, quoting *Boyer v. U. S.*, 132 F.(2d) 12, 13 (App. D.C.) to the effect that the other alleged bad acts must be so connected with the offense charged in point of time and circumstances as to throw light upon the intent. This Court further held that it was error to admit a copy of an accountant's tentative partnership return for the reason that it was in no way connected "in point of circumstances" with the offense charged in the indictment.

In *Lloyd v. U. S.*, 226 F.(2d) 9 (C.A. 5), a specific item tax prosecution for the years 1945, 1946 and 1947, the government introduced statements given by the defendant to the agent concerning his assets and liabilities for the period 1924 to 1932. The government then introduced further evidence in an attempt to show that the facts stated concerning these assets and liabilities were untrue. The court held that this evidence was inadmissible and highly prejudicial and reversed the conviction because of it.

In *Hartman v. U. S.*, 215 F.(2d) 386 (C.A. 8), a specific item tax evasion prosecution for the years 1945 and 1946, the court held that it was prejudicial

error for the prosecutor to have put into evidence a long list of irrelevant matters even though some of them were of small moment, which tended to arouse suspicion that defendant had been guilty of misconduct in respect to his income taxes and to excite prejudice against him, but which did not tend to prove the charges of the specific items in the indictment. These matters included the formation of a family partnership, failure to report items that the defendant's accountant had failed to take off the books, and padded expense accounts for years prior to the indictment years, the specific items in the indictment years for which he was being prosecuted not having anything to do with any of these matters.

In *Blumberg v. U. S.*, 222 F.(2d) 496 (C.A. 5), a specific item tax prosecution, the government introduced evidence that defendant's wife took to New York in a hand satchel \$30,000 in cash and had a tremendous wedding for her daughter. This evidence did not tend directly to establish any of the specific items charged in the case. The court reversed the conviction on the ground that this was improper and prejudicial error.

A great part of the present trial was taken up by the mass of testimony and exhibits concerning financial affairs of the defendant for years long prior to the indictment period, and with the financial statements of defendant to the banks, which were within the indictment period but which like the earlier material served no purpose in the case other than to attempt to prejudice the jury against the defendant. None of this evi-

dence showed that defendant had received more income than was reported on his returns for the years involved. If it had, undoubtedly the prosecution would have used the net worth method in this case. None of it indicated in even the remotest degree whether or not the defendant or the guests and employees received the benefit of the allowances.

The irrelevant and immaterial evidence so admitted was used by government counsel in argument in a manner that emphasizes clearly its impropriety and prejudicial character. Government counsel stated (R. 1090-1093):

“There is another one, the statement of Mr. McCarthy. Why would he tell Mr. McCarthy about these financial statements? Why? Because the financial statements were, in the eyes of Mr. Corbett, supposed to explain how he could go into these transactions in 1948 of \$110,000, and because he had not reported anything as was shown on his tax returns from 1940 to 1948, or a negligible amount, he has to show a loss, so he makes these statements, financial statements to Mr. McCarthy in order to convince him in the course of his investigation that his financial statements are true and that his tax returns are true. And his reason for those financial statements where he shows a loss of some hundred thousand dollars in the course of these years, the reason is to get Mr. McCarthy to believe that his financial statements confirm the false tax returns.

“Now compare that with the financial statements given to the bank. Now what is the reason he tells the bank that? He says, ‘Oh yes, it is true that I

am worth \$28,000 in 1948, but it is also true I am worth \$2,500,000.' And what is his explanation? One is a trading value and one is a cost value. He went over that one pretty fast. Now the financial statements are not, to the bank, are not to be considered as any evidence of income, but they are to be considered as another statement given about the same time as to whether or not Mr. Corbett was telling the truth when he made the statement to Mr. McCarthy or was he in fact attempting to make another false statement to the government agencies, an attempt to convince the government that his false returns were true.

"Now those statements in 1938, we had quite a time with that yesterday. We went through those and that brings us up also to the statements he made to you. Now he had gone through these statements with Mr. McCarthy. Now when Mr. Corbett testified yesterday he was confined unfortunately by about three things. First, he had to account for a bankruptcy petition that he had filed in 1925. He had to account for an affidavit he made in 1928. He had to account for the statement he told Mr. McCarthy what he was worth in 1938. He had to account for the fact that he was, made an affidavit of being on welfare, that he had made, been sued for \$200.00 fuel bill. He had to account for the bank statements. Now that is sort of tough to work your way around especially when you give a statement that you are worth \$110,000 in 1938 and you are sued for a fuel bill for that small amount. It is tough to account for being worth \$110,000 and having all that cash on hand and \$7,000 in travelers' checks and all the rest of that, when you borrow \$300.00 from your mother to come out here from Okla-

homa and she takes a mortgage on your trailer. Now that is pretty hard to explain, especially when you say that is the mother you left some \$16,000 worth in 1920. It is pretty hard to explain that, but he tried and we had \$6,500 kicked from the attic down to the garage and back again stuck somewhere in a box, a trunk and finally tools, \$6,500 in old coins. What he had to do, he had to have it in 1920 because that is what his statement said. He couldn't have it in 1925 because then his petition of bankruptcy is false. He can't have it when he can't pay his bills, so he finds it somewhere around in there and disposes of it, something to do with just before the bank crash.

"He has to account for \$25,000 he says that he loaned his parents. His father had left when he was two. He comes back when he is sixteen and by that time he has \$30,000 he has won while he is working as a cook. He gives his father \$16,000 and the sheriff has to get the—all of these things to go to what you can judge is this man telling the truth?"

The Court in its instructions in no way cured the prejudicial effect of this testimony and this argument. The Court instructed (R. 1123-1124):

"Financial statements given by the defendant to various banking institutions during the indictment years have been admitted in evidence. These statements were admitted and can be considered by you for two purposes only. First, you can consider whether these statements conflict with the statement given by the defendant to the Internal Revenue Service during the investigation. If you

find that there is a conflict in these statements, you may only consider such conflict as bearing upon the truth of the statement to the investigator. If you find the statement to the investigator was not truthful, you may then consider this fact as bearing upon the credibility and intent of the defendant with respect to the failure, if any, of the defendant to report income and tax due thereon in the defendant's tax returns for the years with which we are concerned.

“Now secondly, I am still talking about these financial statements, secondly you may consider whether the financial statements bear upon the knowledge of the defendant as to his true financial position and the propriety and accuracy of the bookkeeping methods under which the defendant's financial transactions were recorded in his books and from which books defendant's income tax returns for the years in question were prepared.

“You may also consider such knowledge as bearing upon his intent, if any, to conceal income and evade tax. You are instructed, however, that these financial statements standing alone are not proof of any unreported income of the defendant in any of the years '45, '46 and '47. They should not be considered in your deliberations as purporting in and of themselves to show that any unreported income was received by the defendant in any year in question. The statements can only be considered for such bearing, if any, as you may find them upon the knowledge and intent of the defendant in filing his returns, if you find from other evidence in the case that there was unreported income and tax liability in said returns.

or not reported in said returns.”

We submit that in introducing as a part of its case the financial statements of 1938 and 1948 which were themselves irrelevant and immaterial and then taking up a great part of the record with highly prejudicial testimony and exhibits having no relationship to the case and no purpose except to try to show that the two financial statements were incorrect, the government went far beyond that which is permissible in a specific item tax prosecution and the Court erred in failing to sustain defendant's objections to the financial statements and to the other evidence.

CONCLUSION

We urge that the case be reversed with instructions to the Court below to enter judgment for the defendant on the ground that insufficient evidence was introduced by the government for a conviction, or in the alternative that the conviction be reversed and the case sent back for a new trial.

Respectfully submitted,

F. A. LESOURD

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APPENDIX A

SUMMARY OF TESTIMONY OF GUESTS ON ALLOWANCES

1945 ALLOWANCES

Name	Record Page Number	Date	Allowance
Mrs. George Jorgensen	324	August 19, 1945	\$ 26.50

1946 ALLOWANCES

Clare A. Mulvihill	487	April 29, 1946	42.35
			36.10
Winnifred K. Lein	489	July 14, 1946	52.96
Nora Longtin	493-494	March 13, 1946	39.05
		April 14, 1946	42.85
		May 15, 1946	42.90
Robert R. Campbell	495	March 2, 1946	51.90
Boyd B. Stevenson	499	July 8, 1946	14.25
Paul H. Giese	501	January 2, 1946	1.88
		January 11, 1946	38.05
Robert K. Lavery	503	March 21, 1946	63.82
Lt. Herbert A. May	506	July 2, 1946	25.58
	507	July 16, 1946	55.30
Robert Quinn McCown	509	February 23, 1946	50.50
Mrs. Don H. Miller	517	January 19, 1946	46.57
Mrs. George Jorgensen	524	June 6, 1946	12.20
Edward H. Fritzsche	526	January 30, 1946	63.53
Jacob W. Hoover	528	March 15, 1946	27.85
Margaret F. McCaffrey	530	March 19, 1946	50.22
William Currie	532	July 2, 1946	48.96
Peter Norman Holm	535	May 31, 1946	31.82
Harry Clifford Butterworth	538	April 3, 1946	78.10
Arthur H. Eckels	540	January, 1946	45.76

1946 Total \$962.50

APPENDIX B

SUMMARY OF TESTIMONY OF EMPLOYEE
BERNICE MORGAN ON ALLOWANCES

(From Exhibit 13)

Name	Record Page Number	Date	Allowance
G. L. Holmes & Mathews	158	January 15, 1946	\$ 44.14
Cameron	163	_____	44.00
Eckels	163	_____	45.76
Brisbois	163	_____	59.59
Shaskain	164	April 3, 1946	127.56
	164	_____	39.38
Helmis	164	_____	50.00
Petersen	164	_____	39.24
Carlson	164	_____	40.77
Steinberger	164	_____	32.82
Lt. and Mrs. Hite	164	_____	32.10
	164	_____	50.00
F. B. Johnson	164	March 19, 1946	92.40
F. B. Johnson	299-259	March 27, 1946	54.50
			<hr/> \$752.26

APPENDIX C

SUMMARY OF TESTIMONY OF EMPLOYEE
LORETTA NEWTON ON ALLOWANCES

(From Exhibits 15, 45, 46, 47, 48, 49, 51)

1945 ALLOWANCES

Exhibits 48, 49

Name	Record Page Number	Date	Allowance
Store No. 1	390 and 453	Nov. 29, 1945	\$100.00

1946 ALLOWANCES

Exhibit 15 (47)

F. B. Johnson	358	April 8, 1946	79.03
A. R. Butterworth	359	April 1, 1946	78.10
Al Anderson	360	March 2, 1946	266.38
Robert McDowan	361	February 23, 1946	50.50
Mrs. Don H. Miller	376	January 19, 1946	46.57
Total Exhibit 47			<u>\$520.58</u>

Exhibits 45, 46

Hotovitzky	369 and 420	April 27, 1946	38.70
Thorpe	369 and 450	April 28, 1946	38.00
Larson	370 and 450	April 28, 1946	40.52
Mr. and Mrs. K. Pearson	370 and 451	April 29, 1946	61.95
Ralph Stackum	370 and 452	April 29, 1946	36.15
Rm. 915	376	May 1, 1946	43.26
Total Exhibits 45, 46			<u>\$258.58</u>

Exhibit 51

Fink	450 and 470		36.70
Arnold	464-465	March 27, 1946	45.20
Fink	464-465-477	March 27, 1946	43.33
Total Exhibit 51			<u>\$125.23</u>
Total for 1946			<u>\$904.39</u>

APPENDIX D

SUMMARY OF TESTIMONY OF ARTHUR BAUMAN
GOVERNMENT EXPERT ON FUMED PHOTOGRAPHS

(From Exhibits 52-62)

1945

Ex. No.	Name	Record	Date	Amount
52	Whitten	549	August 14, 1945	\$ 15.44
53	Petersen	551	August 15, 1945	32.00
54	Jenkins	553	December 20, 1945	44.54
55	Stolfi	556	December 21, 1945	52.49
55	Franki	556	December 21, 1945	50.32
56	Cacy	557	December 23, 1945	38.15
57	Jenkins	558	December 28, 1945	44.40
57	Bersaker	559	December 28, 1945	46.95
58	Sandwick	561	December 31, 1945	122.66
58	Chiswell	562	December 31, 1945	57.11
58	Geissler	563	December 31, 1945	62.58
Total 1945				<hr/> \$566.64

1946

59	Douglas	563	January 3, 1946	91.32
60	Fanning	564	January 5, 1946	52.60
60	Savage	567	January 5, 1946	40.50
61	Hayes	569	January 9, 1946	33.09
61	Downey	570	January 9, 1946	43.05
62	Petersen	571	January 11, 1946	39.24
62	Atherton	572	January 11, 1946	51.06
62	Giese	572	January 11, 1946	38.05
Total 1946				<hr/> \$388.91
Total 1945 and 1946				\$955.55

APPENDIX E

DUPLICATIONS OF WITNESSES TESTIFYING
TO SAME ALLOWANCE

Ex.	Name	Date	Witness #1	Witness #2	Amount
1945					
52	Whitten	8/14/45	Bauman (R 549)	Vowles (R 617)	\$ 15.44
				Total 1945	\$ 15.44
1946					
15	Albert R. Butterworth	4/3/46	Harry Clifford Butterworth (R 538)	Newton (R 359)	78.10
13-62	Petersen	1/11/46	Morgan (R 164)	Bauman (R 551)	39.24
62	Paul M. Giese	1/11/46	Giese (R 501)	Bauman (R 572)	38.05
15	Robert Quinn McCown [Robert McDowan]	2/23/46	McCown (R 509)	Newton (R 361)	50.50
15 [47]	Mrs. Don Miller	1/19/46	Mrs. Miller (R 517)	Newton (R 376)	46.57
13	Arthur H. Eckels	1946	Arthur Eckels (R 540)	Morgan (R 163)	45.76
				Total 1946	\$298.22

APPENDIX F

(Excerpt from Plaintiff's Ex. 74)

BILL CORBETT — YEAR 1945

Computation of Corrected Net Income and Tax

Income per Return Filed

Wages.....	\$ 2,668.62
Dividends and Interest.....	375.00
Other Income—Sundry, Wagering, etc.....	700.00
Business Income—Claremont Hotel.....	6,777.86

Community Share—Adjusted Gross Income

.....	\$10,521.48
Less: Standard Deduction per return.....	500.00

Community Share—Net Income per return

.....	\$10,021.48
-------	-------------

Add: Unreported Room Rental Income—184 days @ \$20.00.....	\$ 3,680.00
Salary from Claremont Apt. Hotel Corp. to Loretta Newton as Corp. officer to Bill Corbett.....	\$368.80
Less: 20% Withholding Tax.....	73.76

Allowances, Claremont Apt. Hotel, restored to rental income	14,959.84
---	-----------

Total Additions to Income

.....	\$18,934.88
-------	-------------

Less: Unidentified Cash Overages and Transient Room Rentals restored to income on books.....	1,465.73
--	----------

Total Additional Net Income

.....	\$17,469.15
-------	-------------

Less: One-half community income to wife.....	8,734.57
--	----------

(Please turn the page)

One-half of the Additional Net Income to Bill Corbett	8,734.58
Corrected Net Income (Bill Corbett)	<u>\$18,756.06</u>
Income Tax on above Corrected Net Income	\$ 6,883.39
Tax as computed above.....	\$6,883.39
Tax per return.....	2,762.94
Tax Deficiency	<u>\$4,120.45</u>

BILL CORBETT — YEAR 1946
Computation of Corrected Net Income and Tax

Income per Return Filed	
Wages	\$ 3,600.00
Interest	1,140.50
Other Income—Sundry, Wagering, etc.	2,000.00
Business Income—Claremont Apt. Hotel.....	12,359.00
Total Community Adjusted Gross Income	<u>\$19,099.50</u>
Less: One-half Community Income to Wife	9,549.75
One-half Community Share Adjusted Gross Income	<u>9,549.75</u>
Less: Deductions:	
Contributions	\$ 403.82
Interest	1,146.81
Casualty and Theft Losses.....	<u>1,000.00</u>

Total Deductions.....	\$ 2,550.63	
Less: One-half to wife (community one-half)	1,275.32	1,275.31
Community Share Net Income per Return		8,274.44
Add: Unreported Room Rental Income—365 days @ \$20.00.....	7,300.00	
Allowances, Claremont Apt. Hotel restored to rental income.....	17,542.83	
Total Additions to Income	\$24,842.83	
Less: Unidentified Cash Overages and Transient Room Rentals restored to Income on books.....	5,106.25	
Total Additional Net Income	19,736.58	
Less: One-half Community Income to wife.....	9,868.29	
One-half of the Additional Net Income to Bill Corbett		9,868.29
Corrected Net Income—Bill Corbett		\$18,142.73
Income Tax on above Corrected Net Income		\$ 5,720.30
Tax as computed above.....	\$5,720.30	
Tax per return.....	1,797.71	
Tax Deficiency	\$3,922.59	

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

BILL CORBETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY

United States Attorney

JOHN S. OBENOUR

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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Whether the defendant can admit to the omission, alteration and removal of thousands of dollars of income from his records through an elaborate system of concealment and escape responsibility

by an unsubstantiated claim that he acted in compliance with O.P.A. Regulations.

2. Whether the defendant can escape responsibility for the evasion of taxes upon thousands of dollars of concealed income by the unsubstantiated claim that such income was returned to the books, when he deposited to personal bank accounts other than the business accounts, over \$96,000 in currency.

3. Was the defendant prejudiced by the testimony of an agent, given without objection, from his work papers of his work upon records either introduced in evidence or present in Court during the trial.

4. Was the defendant prejudiced by the testimony of an agent of his computations of corrected net income of the defendant and the tax due thereon, made from the exhibits and testimony introduced into evidence.

5. Was the defendant prejudiced by introduction of financial statements given to his banks during the indictment period, which were contradictory to statements given to the Government agents during the investigation.

6. Was the defendant prejudiced by cross-examination upon transactions prior and subsequent to the indictment period that would both impeach his testi-

mony given upon direct examination concerning these periods, and would directly bear upon his intent to evade taxes and upon his knowledge of his true financial position and tax returns filed.

7. Was the defendant prejudiced by denial of the use of exhibits in the course of the trial when by agreement desired exhibits were delivered to the office of defense counsel for use during the week-end and no objection was made thereto.

COUNTER STATEMENT OF THE CASE

The defendant Bill Corbett, a Seattle hotel operator, while reporting a net loss of \$17,000 during the indictment years of 1945 through 1948, deposited in personal accounts other than the hotel account, over \$96,000 in currency in the years 1945, 1946 and 1947. During this time he also expanded from the original hotel to vast holdings, including two motels and two inns, and variously estimated to be of a value of one to two and one-half million dollars as of 1948.

The defendant was indicted upon four counts of tax evasion for the years 1945 through 1948. The Court dismissed Count 4 pertaining to the year 1948. The jury convicted him upon Counts 1 and 2 pertaining to 1945 and 1946, and acquitted him upon Count 3, for the year 1947.

The defendant admitted in the trial that he removed or caused to be removed items of income from his records but claimed that this was done to comply with O.P.A. regulations and that this income was returned to the books. He could find no evidence in his records to substantiate this claim in the amounts shown to have been removed.

Through all of his operations he was in complete control of his employees and of the records they maintained. While disclaiming any knowledge of books or bookkeeping, his system gave him complete supervision of the hotel activities and knowledge of all receipts properly recorded and of the receipts which regularly came into his hands and went unreported.

The Government proved through his employees and his records that he reduced his reported income through the use of allowances falsely claimed to have been given to guests, through duplicate invoices for bills already paid which he turned in for cash or checks of the hotel for himself, through room rentals omitted from the records and turned in to the defendant by an envelope system, and by checks issued to an employee, Loretta Newton, and reported upon her income tax return, which checks were in fact returned to the defendant.

While admitting the use of false allowances which

were shown by a Government expert who had reproduced certain ink eradicated entries upon the hotel records, Mr. Corbett denied or alibied the other charges. In each instance he accused the several employees and associates of testifying falsely because of grievances with them (R. 1009-1019). However, his own demeanor upon the stand, his evasive answers and his conflicting explanations all contributed to the jury's determination that he, not they, testified falsely.

The defendant, in 1944, acquired the stock to the corporation owning the Claremont Hotel, 150 unit building, in Seattle, Washington. He operated the hotel through the corporation until July 1, 1945, when he began operation as a sole proprietorship which he continued until its subsequent sale (R. 863, 934). In 1947 he built two motels on the Seattle-Tacoma highway and bought two inns in Oregon (R. 934-936).

The defendant continued the bookkeeping system installed when he acquired the Claremont Hotel and retained the same bookkeeper, Mrs. Beatrice Murta. The system consisted of cash sheets and guest ledger sheets maintained by the desk clerks and regular books maintained by Mrs. Murta. Three shifts of desk clerks were employed who were to enter all cash receipts upon the cash sheets and all payments by guests upon the guest ledger sheets. A daily transcript of these re-

ceipts and of all charges to guests was made by the night clerk. This daily transcript, the cash sheets and the daily receipts were then checked by the bookkeeper and the contents recorded upon her records.

A cash drawer at the desk was used by the respective clerks to keep all of the hotel receipts, and its contents were balanced with the cash sheet by each change of shifts. The daily receipts were tabulated by the swing shift clerk and given to Murta for deposit in the hotel company bank account.

Guest ledger sheets were maintained in duplicate by the clerks and daily charges were entered by the desk clerks as well as all payments. When a guest checked out, his payment was supposed to be recorded, the original white copy stamped paid and initialed by the clerk receiving payment, and this white copy given to the guest as a receipt. The yellow duplicate was retained as a hotel record.

The system was adequate and the hotel forms contained appropriate descriptive columns for all entries, including columns for allowances to be given guests.

However, falsification of the records came through misuse of allowances taken or directed by Corbett. Corbett installed an additional system of "allowance slips." These slips were prepared by the

clerks from the guest ledger sheets and were sent each morning to the bookkeeper with the cash sheet and transcript. She then gave them to Corbett who personally approved each one and noted a "reason" for the "allowance." They were then returned to the bookkeeper who entered them in an allowance journal.

The clerks testified that these "allowances" were entered by them at Corbett's direction. They stated that after a guest had paid his bill, Corbett either removed the entry recording such payment from the cash sheet by the use of ink eradicator or directed them to do so (R. 149, 150, 352-354). He would then remove cash from the cash drawer in the amount of the entry removed from the cash sheet. The cash sheet and cash drawer then balanced. Corbett or the clerks would then make a second entry over the entry removed by ink eradicator (R. 168).

In addition, Corbett would direct the clerks to make an entry upon the yellow duplicate guest ledger sheet changing the original carbon entry in the cash column to an entry in the allowance column. *This allowance would be for the entire amount of the bill.* An allowance slip in the same amount would be prepared by the clerk, approved by Corbett and returned to Murta. Her entries of these slips in the allowance journal reduced the income reported by the hotel rec-

ords. These allowances totaled \$22,400 in 1945 and \$28,000 in 1946.

The system varied to some extent in the instances Corbett, through an intercommunication system controlled from the balcony or being personally present, would direct the clerks to omit the entries from the cash sheets (R. 365). Then ink eradicator was of course not required. On other occasions entire cash sheets were rewritten at Corbett's direction when some items would be omitted (R. 348). On other occasions entries to be removed were selected by Corbett and marked by a pencil check mark. The clerks then removed these entries from the cash sheets, changed the guest ledger sheets, and removed a like amount of cash from the cash drawer which they put in an envelope marked "B.C." for Mr. Corbett (R. 353-354). This practice continued at Corbett's direction while he was on vacation, with the removal of \$50 to \$60 payments (R. 366-367). It also varied when no entry would be made upon the duplicate guest ledger sheet at all or the entry would be made directly to the allowance column (R. 364).

The system did not vary, however, in certain details—Corbett always received the money removed from the cash drawer, Corbett always checked each allowance slip, and cash "allowance" for this cash payment received and removed from the drawer, sub-

sequently reduced the hotel income reported upon the tax returns of Mr. Corbett. Corbett controlled the removal of these allowances but insured that no one else could use the "ink eradicator-allowance slips" method to the detriment of Mr. Corbett. He could always check the money he received against these allowance slips.

The clerks, Beatrice Morgan, Irene Krueger, Loretta Newton, Alfred Wright and Harold Vowles, all testified they made no entries returning any of these allowances to the cash sheets.

Prior to trial, Beatrice Morgan, Irene Krueger and Loretta Newton went through those guest ledger sheets and allowance slips of the hotel that were in the possession of the Internal Revenue Agents. These clerks segregated those that they could identify by entries in their own handwriting. This identification was made of erased entries in the cash column of the guest ledger sheets that were still legible, of entries in the allowance column, by allowance slips written by them, or of initials upon checks received from guests in payment of bills subsequently removed as an allowance. These segregated records were Exhibits 13, 14, 15 and 51 (R. 157, 210, 356 and 464).

Segregation of ledger sheets and allowance slips were also made by Mr. McCarthy, an Internal Revenue

agent, of those instances where an entire bill was given as an allowance, where the cash entry was erased or no entry at all made, and where allowances corresponded in amount to checks deposited in bank accounts the following day (R. 748-750). These, in addition to exhibits also identified by other witnesses, were Exhibits 16, 72A, 72B, 72C, 73A, 73B and 73C (R. 108, 753-757).

The Government also called twenty-one guests. Each testified he had stayed at the Claremont Hotel, had paid his bill in full upon departure and had received no allowance upon his bill of any kind. In each instance, the entire amount of the bill had been claimed as an allowance for which the duplicate ledger sheet had been altered, an allowance slip made out and the allowance taken in the allowance journal (Exhibit 17). Original ledger sheets recording cash payments were produced in some instances, and compared to the altered duplicate hotel record. Other guests produced checks or check stubs proving payment (R. 484-540). Still other guests mailed similar records of payments to McCarthy (R. 106-108) which were identified by the clerks who had initialed the checks or ledger sheets (R. 165, 356, 359, 360, 361, 362).

Prior to taking a trip in 1945, Corbett instructed clerk Newton she was to be in charge of the hotel, and

that she was to run the \$100 store rental through as an allowance [there were five stores in the hotel rented to commercial tenants (R. 39)], continue allowances and put money in safe (R. 392) and if anything happened to the Corbetts, Newton was to read a book in Corbett's desk for instructions concerning money Corbett's oldest son Frank was to divide among the four children and "*no one need know any more about it.*" She recorded these instructions in her notebook, Exhibit 48 (R. 392-393).

Newton testified on one occasion Corbett called her into his office and after mentioning allowances, told her she was just as guilty as he was (R. 395). Corbett testified he was talking about O.P.A. regulations when he had this conversation with Newton (R. 918, 1014).

Newton testified she kept a record of these allowances she made until she consulted an attorney who advised her that she need not worry since she was acting on orders of Corbett (Exhibit 45, 46; R. 455-456).

Among allowances given were an allowance for store rental of \$100 marked "cash short" (Exhibit 49, R. 454), allowances on more than one occasion to the same guest (R. 450, 470, 476), duplicate allowances for the same date for the same guest (R. 1031) and days when there would be six allowances totaling

\$200.74, and nine allowances totaling \$345 taken and the cash sheets would only report two receipts totaling \$38.00 and \$15.00 (R. 459-461).

One guest received a \$7.00 refund on February 21, 1946, after the entire bill had been shown as an allowance by Mr. Corbett (Exhibit 16). The records then showed the guest was *paid \$7.00 for staying at the hotel* (R. 291-294). To this, on cross-examination, Corbett concluded she must have had a fancied grievance (R. 1031).

Arthur Bauman, a Government expert, introduced 11 photographs he had made of ink-eradicated entries on the cash sheets (Exhibits 11, 12 and 13) that he had reproduced by random selection (R. 541-547). In each instance, the removed item was taken upon the allowance journal, and generally a small item entered over the eradicated space. Some sheets showed two or three eradications. The total of these 19 ink-eradicated receipts was \$963.47 over which receipts of 15c, 18c, 42c and \$1.00 had been made. These reproductions were so convincing that when trial counsel at cross-examination offered to reproduce any eradicated entry on the cash sheets that Corbett might question as to having been claimed as an allowance, Mr. Corbett said (R. 1034):

“A. No. You have got—you had twenty people

here. I believe in less than a week if you'd let me help you we would have went down and got nearly all that was there."

Special Agent Holtberg computed these allowances from Exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 72 and 73 and they totaled \$14,595.84 in 1945 and \$17,542.83 in 1946. These amounts were included by Holtberg in his computation of the corrected net income of Mr. Corbett for the years 1945 and 1946 (Exhibit 74, R. 797-799).

An additional source of unreported income was the rentals by the night clerk, Vowles, which were not entered upon the cash sheets at Corbett's instructions. Vowles testified he rented from 1 to 17 rooms per night on a one night basis which he did not enter on the cash sheet. He put the money and a record of the rentals in an envelope marked "B.C." for Corbett. This was done at Corbett's instructions. The rentals averaged 5 to 6 rooms per night and from \$20.00 to \$30.00 in receipts and was followed nightly from February, 1945, until November 1, 1947, except for the period of a vacation taken by Corbett in 1945 and again in 1946. He also rented 15 cots on the hotel mezzanine to servicemen for \$1.00 per night which were also omitted from the cash sheets and given via envelope to Corbett (R. 605-610).

Vowles stated that he kept a record at home of

these rentals which he subsequently threw away. He remembered that this record showed over \$7,200, but could not remember specific dates or amounts (R. 612-613).

The other clerks, Morgan, Wright and Newton, testified they found cash overages or envelopes in the drawer at the beginning of the morning shift (R. 394, 581, 152). They also noted cots were rented but the receipts were not reported, and that registration cards marked "paid" were handled differently by Vowles for rentals not shown on the cash sheets, for rooms they had been instructed by Corbett to save for rental by the night clerk (R. 394, 155, 576, 581). Newton testified she saw Corbett burn registration cards and that she had burned registration cards at his direction (R. 378).

Revenue Agent Marx computed these rentals from Vowles' testimony at the minimum night's average of \$20 for the period Corbett operated the hotel as sole owner in 1945, 1946 and the period in 1947 that Vowles followed this practice (R. 613, 633). Holtberg included this computation in his computation of unreported income (Exhibit 74) in the amounts of \$3,680 in 1945, \$7,300 in 1946 and \$6,080 in 1947 (R. 796-804).

Newton testified that within one month of being

employed as a clerk at the hotel, Corbett advised her she was a vice-president of the hotel corporation. She attended meetings where she voted on such issues as raising Corbett's salary. For this she was paid \$368.80 from which \$73.60 was withheld as tax in 1945. She signed all of the checks over to Corbett and received no proceeds from them. She reported these amounts, however, upon her income tax return. She received a tax refund that year which may have included some of the money withheld from the checks (R. 382-384). Holtberg included \$295.04 upon his computation of Exhibit 74.

Holtberg computed additional income for Mr. Corbett for the years 1945, 1946 and 1947 (Exhibit 74), from these allowances, night rentals and Newton's salary checks. In 1947 there was also income not reported from the Corbett Motel.

Gunder Birkeland, a man who loaned Corbett money, produced a paper received from Corbett which reflected income from the Corbett Motel operation for June, July, August and September, of 1947. This income was \$15,105.00, less expenses of \$2,580 for a net income of \$12,525.00 (Exhibit 65, R. 644-650). Marx computed additional income from Exhibit 65 and from the hotel journal (Exhibit 9) in the amount of \$12,337.43 (R. 778). This was included in Holtberg's computations for the year 1947 (Exhibit 74).

Corbett denied giving Birkeland this paper (R. 938-940, 1042) and stated he couldn't see where it could be since the motel wasn't in operation until after September, 1947. He was referred to his own books (Exhibit 9) which recorded \$2,547.00 in June, \$1,800.00 in July, \$500.00 in August, and none in September, October or November of 1947. Corbett wondered if this could have been from the sale of wood. (R. 1042). Corbett reported on his return for 1947, the expenses of the motels but only \$3,512.47 of income.

The bookkeeper, Murta, testified she received money from Corbett from time to time which he called "store rentals" or "overages." She added some of these amounts to the cash sheets but not always (R. 269-270). Marx testified he examined the cash sheets and found lump sum payments entered as "overages" and "transient rents" in the amount of \$1,465.73 in 1945, \$5,106.25 in 1946 and \$1,886.78 in 1947 (R. 763). The amounts were *deducted* by Holtberg in his computation as *possibly* being money Corbett received from the holdouts of allowances, night rentals, Newton's salary checks or the motel operation (R. 797, 800-802, 804). *In addition to these cash sheet entries*, Holtberg computed additional unreported income of Corbett's half computed on the community property basis, of \$8,734.58 in 1945, \$9,868.20 in 1946 and instead of the joint loss reported by the Corbetts in 1947 of

\$12,472.47, a community share for Corbett of \$3,539.01. Upon this additional income, additional tax was computed to be \$4,120.45 in 1945, \$3,922.59 in 1946 and \$597.15 in 1947 (R. 797-805).

In addition to this evidence used in computing unreported income, the Government produced a great deal of other testimony bearing upon Corbett's operation which certainly reflected strongly upon the intent of Corbett to evade his income tax by concealing this income.

Examination of the cash sheets (Exhibits 10, 11 and 12), showed almost daily use of ink eradicator. (R. 197-201). Upon cross-examination, Clerk Morgan selected sheets containing entries she identified as made by Corbett (Exhibit 11-A). Over three eradications on the sheet of March 27, 1946, totaling \$134.03 of receipts removed and claimed as allowances. Corbett had entered "local phone—25c," "L.D. phone—15c" and "telephone commission—\$7.35" (R. 241-246).

Allowance slips in large amounts were marked "Cash shortage" by Corbett. All clerks testified that there never were any such shortages (R. 213). Murta testified that when she received the cash receipts and the cash sheets, they balanced or had overages. The shortages, if any, would be a few cents or two or three dollars (R. 314, 333). Thereafter, she gave the allow-

ance slips to Corbett, and when she got them back, he had marked "cash short" upon them. These were then entered in the allowance journal and in the "cash over and short" account with the resulting reduction of reported income (R. 334). Murta never made any adjustments returning any allowances, night rental or envelope money to the hotel records, unless it was included in the money given her by Corbett (R. 279-286).

Murta testified she charged the purchase of stamps as an expense of the hotel (R. 272-273). Clerks Morgan and Newton testified that these stamps were sold at the desk and the proceeds kept in the "stamp drawer." On Corbett's instructions, the Corbett children removed the money for their own spending (R. 173-175, 380-382, 391).

Clerk Wright testified Corbett used ink eradiator, made a mistake, tore up the cash sheet and rewrote the sheet omitting entries. He also testified he rented apartments of permanent guests in their absence, to transient guests and omitted these double rentals from the cash sheet (R. 614, 617).

Harry Waldron testified that while he worked as manager of the Pilot Butte Inn in Bend, Oregon, Corbett, and sometimes his daughter, come regularly to the Inn, that they came at night after he went off shift and generally left before he came to work in the

morning. After their visits, Waldron noted cash sheets were altered, house accounts were reduced, reflecting fewer occupancies, the registration cards used as guest billings had been tampered with and duplicate cards used to conceal room rentals. On one occasion he saw the daughter, Peggy Corbett, re-writing a cash sheet. Cash also had been removed to correspond to the altered records (R. 666-667, 676-677).

John Bunch, the accountant who prepared Corbett's 1947 and 1948 tax returns said that in the course of his work he found that duplicate invoices had been submitted to the bookkeeper for bills previously paid and reported as an expense. In 1947 he made 26 adjustments and 81 adjustments in 1948 (R. 722). One adjustment charged back a check in the amount of \$19,765.00 paid to Bill Corbett for such duplicate invoices and another was for \$11,661.00 to Corbett for a duplicate invoice claimed for a bill in 1947. The total of the adjustments in 1948 was \$63,000.00 (R. 722-726).

Newton testified Corbett submitted duplicate cash vouchers to her and received cash after the original voucher had been paid to an employee or a repairman. The entire Corbett family submitted cash register tapes also marked groceries or advertising for which they received cash from the drawer (R. 378-380, 385-386).

Wright stated Corbett entered the cash drawer while he relieved Wright and removed large bills replacing them with small bills or a slip marked "B.C." Corbet said he had a hobby of collecting money (R. 920, 1019).

Agent Marx made a comparison of the allowance slips with the deposit tickets of the various bank accounts of the Corbetts. He compared the deposit tickets of the day following the date of the allowance slips for checks of amounts identical to the allowances. These amounts totaled \$18,000.00 in 1945, 1946 and 1947 from Exhibit 72A, B and C, and approximately \$2,500.00 for the same period from Exhibit 73A, B and C. (R. 770-773).

Marx also computed the currency deposited to the various Corbett accounts *exclusive of the hotel account*. There was \$96,356.81 deposited in these *other* Corbett accounts during 1945, 1946 and 1947 (R. 775). Examination shows very little cash was deposited to the hotel business and petty cash accounts.

Dewey Metzdorf, a hotel operator, testified Corbett told him in 1946 while discussing a proposed sale of the Claremont Hotel, that the hotel was netting \$86,000.00 per year (R. 654-657). Corbett reported \$13,555.73 in 1945 (Exhibit 1) and \$12,359.00 in 1946 (Exhibit 3), from the hotel operation.

Ernest S. Martin testified that Corbett told him during a discussion of the motel operations that he had an *independent method* of laundry other than the commercial laundry to take care of sheets and pillow cases. Corbett said he did the laundry himself so he wouldn't have to report all the income from the motels. That way they couldn't check on his rentals. Also Corbett said he rented rooms more than once a day or a night and wouldn't report this rental. He said he saved one-third to one-half of his income from being reported (R. 640).

Martin testified that on another occasion at the hotel, Corbett showed him ten to fifteen cards which he said were room cards. Corbett said he saved these out every night so he and his son could collect the rentals and not report it. Corbett said it amounted to considerable (R. 642).

Corbett's daughter testifying for her father, on cross-examination, testified she lived at the hotel and at the motel, and that after a washroom was built, *she did the laundry for the motel* (R. 846). There was then a noon recess, and immediately *after* the recess she resumed the stand and on redirect said she meant she did her own laundry (R. 852).

Corbett testified in his own defense and told of his life from birth, exhibiting an excellent memory for

much detail about his life. However, on other matters, he was very evasive, vague and contradictory in his statements where he attempted to coordinate these details with other statements he had made. In the course of the investigation he gave a statement to the agents and also financial statements represented as being his financial position in 1938 and in 1948. These statements conflicted with his testimony on the stand and to statements given to third parties.

Corbett admitted he removed items from the cash sheets because of O.P.A. regulations. He claimed he gave the money back to Murta to enter on the records for tax purposes (R. 899-900). However Exhibit A-8, which he claimed was a list of these items he returned to Murta, was actually a list of transient rents and cash received which had been reported by Murta in the usual course of business and couldn't be the amounts he claimed (R. 1000). When asked, he was unable to find an entry where he put back money from Vowles or the Clerks (R. 1001-1004). After recess he found one entry of \$400.00 marked "*cash shortage.*" This had already been included in Marx's computation (R. 1004-1005).

He offered Exhibit A-7, his application for rental rate adjustment to the O.P.A. as proof of this claim that he manipulated his records because he couldn't get the increase. *However, it was shown on the face of the*

application that the application was stamped "Approved—Sept. 2, 1944" (R. 1006).

Asked what O.P.A. had to do with the approval of an entire bill, Corbett testified:

"A. I would be unable to tell you and I don't think they could either" (R. 1007).

Asked about cash shortages claimed when Murta and the clerks said there were none, Corbett said "*cash shortages*" come from "*overages*" (R. 1019-1020).

Asked about his instructions to Newton that "Frank should divide the money and no one need know," Corbett said he tried and tried to think and he couldn't imagine (R. 1015).

Asked about the duplicate invoices Bunch corrected, Corbett said that the duplicate invoices were submitted by him but were accidental. He couldn't remember duplicate vouchers to Newton (R. 1022-1023).

Asked how checks were shown on the hotel deposit tickets which weren't on the cash sheet, Corbett was evasive and confused and finally said he couldn't explain (R. 1034-1035).

Corbett said he put all income received on the books but \$1,400.00 in 1945, \$2,000.00 in 1946 and \$1,500.00 stolen from the safe in 1947 (R. 1038).

The \$1,400.00 and \$2,000.00 were entered on the 1945 and 1946 tax returns as "wagering." Corbett couldn't say where these amounts came from but was "some kind of cash I obtained some place" (R. 1038-1039).

The \$1,500.00 was "envelope money" stolen from the safe and not made good by the bonding company. This didn't get on the books as income and was taken as a tax deduction in 1947 (Exhibit 5). However, it was shown that in September, 1947, Corbett received a check for \$1,500.00 from the hotel charged as theft loss. So, Corbett personally received the money that was taken as a theft loss on the books and again on the return upon income not even reported in the first place (R. 1039-1041).

Asked if he did not take checks from the motel receipts, run them through the hotel account as hotel income in place of cash he removed and deposited to his other accounts, Corbett said, "I don't know. If the book shows that, that could be" (R. 1037).

Corbett admitted the manipulation of the records and the withdrawals from the hotel funds described by other witnesses. The jury did not believe his explanation when confronted by the testimony of these witnesses. They convicted him of evading his taxes for 1945 and 1946 as charged in Counts 1 and 2.

SUMMARY OF THE ARGUMENT

- A. Evidence clearly established that the defendant intentionally evaded his proper income tax by an elaborate system of concealment.
1. False allowances were claimed for bills of hotel guests that were actually paid by the guests.
 2. Legitimate allowances, if any, were not included in the Government computations.
 3. Defendant's claim that this manipulation was done to comply with O.P.A. regulations was completely disproved.
 4. Rentals by the Night Clerk, Vowles, were omitted from the records and amounted to \$20.00 per night that were given directly to the defendant.
- B. Corbett's claim that while he admitted removing this income for O.P.A. purposes, he returned it to the hotel books and to the hotel bank accounts was disproved.
- C. Defendant obtained the salary checks given to an employee for serving as a corporation "Vice-President", but caused the proceeds to be reported upon her tax return rather than his.
- D. Revenue Agent Marx, in testifying upon comparisons of records and computations of currency deposits and of check deposits violated no rights of the defendant when included were \$497.14 in

checks shown upon duplicate deposit tickets present in the Courtroom but not in evidence.

- E. The computations and testimony of the expert witnesses in summation of the Government case were entirely proper and in no way invaded the function of the jury.
- F. Financial Statements given by the defendant to his banks were properly introduced by the Government as showing contradiction to statements furnished Government agents in the course of the investigation.
- G. The defendant was properly cross-examined for the purposes of impeaching his testimony given in direct examination and for proving his intent to evade his taxes and his knowledge of his true financial position:
 - 1. Upon transactions prior to the indictment period;
 - 2. Upon transactions subsequent to the indictment period.
- H. The defendant had adequate access to exhibits during the course of the trial by delivery of same by a Government agent as agreed.

ARGUMENT

Appellant's brief very cleverly attempts to confuse the issues of this case and the fact that the origi-

nal defense counsel at the trial, Mr. Tracy Griffin, stated in the motion for a new trial that the only question was whether or not the Director of Internal Revenue must under the statute, in addition file a certificate of the claimed amount of tax due or the deficiency involved. Mr. Griffin said (R. 1143):

“I may say that in my analysis of the two weeks’ trial that is the only substantial question worthy of consideration by either Your Honor or an Appellate Court.”

Defense counsel was recognized by the trial court as one of the ablest trial lawyers in the United States and that he made a question of it when there really wasn’t one. Mr. Corbett acknowledged that he was satisfied with that (R. 1153-1154). Neither of the two defense attorneys of the trial are associated with the appeal. The question noted by Mr. Griffin is not now noted in the appeal.

A. Evidence of Tax Evasion By Corbett By False Allowances

1. The Government proved that the records of the hotel operation were falsified through the removal by ink eradicator of cash receipts from the cash sheets, by allowances claimed that were false, by receipts from room rentals that were never entered and by expenses claimed upon duplicate invoices and vouchers that had been paid.

The total allowances taken by the hotel were \$22,579.41 in 1945 and \$29,784.70 in 1946 (R. 783). Of these amounts the Government proved \$14,959.84 in 1945 and \$17,542.83 in 1946 specifically as being false claims for bills that had actually been paid. These amounts were proved by the Clerks Morgan, Krueger and Newton who had separated the ledger sheets and allowance slips they could recognize by entries in their own handwriting. These exhibits were identified in Court and no question raised then as to identification of these exhibits (Exhibits 13, 14 and 15).

Morgan, by reason of her shorter period of employment identified fewer ledger sheets. She testified in detail concerning them. No question is raised by the Appellant concerning these allowances being false. However, appellant questions the identification of Exhibit 15 by Newton and would credit only \$100.00 in 1945 and \$904.39 in 1946 out of the thousands of dollars included in that exhibit. Appellant contends that the segregation was by the agents and that Newton did not identify the exhibit. However, she testified (R. 356-357) that she had examined the cash sheets and guest ledger sheets with Special Agent Holtberg prior to trial and segregated those she could identify by her writing. She identified Exhibit 15 as being those she segregated. Because of the volume she did not testify concerning all of the allowances in the

exhibit but only some particular ones. No question was raised by the defense at the trial, of the other ledger sheets and allowances contained in the exhibit. Appellant's alleged claim of confusion concerning the first sheet not being an allowance in her handwriting is best met by setting forth her entire answer (R. 357):

“Q. Now would you show by example there, please, to the jury and the Court how you determined that those were your entries?

“A. Well, under the line where it says cash, it has been erased but you can read \$50.43 which is in my handwriting, and underneath it there is a \$50.43 which is on the allowance line. That is not my handwriting.”

The entry in her handwriting, in the cash column which had been erased, showed that she had received payment of the bill taken as an allowance. While some of the sheets in Exhibit 15 may have contained a proper entry, each sheet contained an improper allowance shown by an erasure, an attached allowance, an original ledger sheet or a check given in payment. Only these improper allowances were included in the Government computation (R. 357-362). Newton testified there were other ledger sheets she couldn't identify but which were false because the balance brought forward by the night clerk reflected a payment or the erasures were so heavy the “cash” entry was not iden-

tifiable (R. 363). These were not included in Exhibit 15.

Special Agent McCarthy identified some of those guest ledger sheets for which allowances were taken and these were included in the Government's proof.

2. LEGITIMATE ALLOWANCES CLAIMED

The defendant claimed that allowances were given to employees and special guests. He claimed he had 37 clerks in 1945-1947 and allowances of \$1,000.00 per month to employees who lived at the hotel. He employed three clerks a day — morning shift, swing shift and night shift. However, it was proved that Vowles was night clerk from February, 1945 to December, 1947 and he didn't live in the hotel. Similarly, Newton worked from June, 1945 to May, 1948 and she didn't live in the hotel. Morgan was there from October, 1945 to May, 1946 and she didn't live in the hotel. Wright was there from October, 1946 to September, 1947. Krueger was there from June, 1945 for six weeks and the year of 1947. Corbett had nothing but his memory to back up his claim and only one shift from May, 1946 to October, 1946 is not accounted for. Marx testified he found only two employees who received allowances (R. 787-788). The transcripts were never produced by the defendant to show if the rentals to any

employees were even charged to the books. The transcripts were never furnished to the agents.

3. DEFENDANT'S CLAIM OF MANIPULATION TO COMPLY WITH O.P.A. REGULATIONS

Defendant admitted the alterations of the records and withdrawal of the cash but said he did it to avoid complaints from O.P.A. regulations (R. 900). He admitted that he instructed clerks to remove large sums from rooms showing more than O.P.A. rates by ink eradicator and to enter other receipts on the cash sheet (R. 912). He offered his applications for rent adjustment (Exhibit A-7) as proof of his claim of alterations in 1945, 1946 and 1947. He said he went ahead and charged more because his rate increase hadn't been approved. *Exhibit A-7 was stamped on its face "Approved Sept. 2, 1944."*

He was unable to answer what removing an *entire bill* had to do with O.P.A. regulations limiting his rental rates (R. 1007).

Newton testified the O.P.A. had nothing to do with allowances but that allowances were given for the entire bill at Corbett's instruction (R. 478-482).

4. NIGHT RENTALS BY VOWLES

Vowles testified he rented rooms held out for him

by other clerks which he did not enter on the cash sheets. He also rented cots on the balcony to servicemen. He said he put the money in the cash drawer or in an envelope marked "B.C." (R. 605). He said he did it every night from February, 1945 to the fall of 1947, except for one trip made by Corbett in 1945 and one in 1946 (R. 607). Vowles said he rented from one to seventeen rooms every night and averaged five to six rooms a night. He said these receipts averaged \$20.00 to \$30.00 per night (R. 610). In addition he rented fifteen cots to servicemen for \$1.00 each (R. 609). All of these receipts were omitted from the cash sheets and given to Corbett (R. 609). Morgan, Newton and Wright all confirmed this method of concealing receipts. Vowles said he kept a record of these rentals at home and that he no longer had that record. He said it was over \$7,200.00 (R. 611). He did not testify that he put all of these concealed night rentals upon his personal record and could not remember the dates he kept the records. He remembered the amount only as over \$7,200.00. The Government used the minimum figure given as his average, of \$20.00 per night. This is substantiated by the testimony of the other clerks who all saw these receipts given to Corbett by overages or envelopes. It is also substantiated by *Corbett's statement to Ernest Martin*. Corbett showed Martin 10 to 15 room cards he said he held out from

the clerks so that he and his son could rent them and not report these rentals. *Corbett told Martin that it amounts to considerable.*

B. Corbett's Claim of Returning This Money to the Books

Corbett said he gave this to Murta in lump sums to be put on the books (R. 905, 916, 1000). Murta said from time to time she received money from Corbett which he called "overages" or "store rentals." Sometimes she put it on the cash sheet (R. 269-270). Marx computed this to be \$1,465.73 in 1945, \$5,106.25 in 1946 and \$1,886.78 in 1947. Appellant now contends that there was an extra \$200.00 restored to the cash sheet in 1945 and \$410.00 entered to the cash journal. No testimony was given by Murta of entering any such money from Corbett on the cash journal and there is nothing to support Appellant's contention. In any event, the \$600.00 would not materially affect the position taken by the Government, since the amount shown by the Government to have been taken by Corbett is \$17,469.15 over the \$1,465.73 computed by Marx.

It is not possible to believe that all of the money taken from the cash drawer under the pretense of allowances as shown by the altered ledger sheets and the testimony of the witnesses can be covered by

\$1,465.73 or \$2,000.00 in 1945 or the \$5,106.25 in 1946 which appellant does not question.

C. Newton's Salary Checks

Newton testified she received checks for acting as "Vice-President" of the Claremont Hotel within one month of going to work there as a clerk (R. 382-384). She said she signed them all over to Corbett without receiving any proceeds from them. Tax was withheld from the gross amount she received as "Vice-President" and she reported these checks on her return. She received a tax refund on her return which might have included part of the tax withheld on the checks. The checks in the amount of \$295.04 went to Corbett.

The Government proved beyond a reasonable doubt Corbett evaded taxes upon unreported income of \$8,734.57 in 1945 and \$9,868.29 in 1946 over and above the money given to Murta and entered upon the hotel books. The \$1,400.00 listed as wagering in 1945 and of \$2,000.00 in 1946 were not identified by Corbett as from any source and so could not be the amounts included in the Government computations. The accountant who included these amounts on the tax returns said Corbett was vague in describing it (R. 684), and Corbett on the stand said he didn't know where it came from (R. 1038-1039).

D. *Testimony of Marx to Conclusions from Records Not in Evidence*

Revenue Agent Marx made two computations from the deposit tickets of the various Corbett bank accounts. In one instant he compared the *allowance slips in evidence* to the deposit tickets of the following day. The allowance slips were attached to the ledger sheets admitted as Exhibits 72A, B and C and 73A, B and C (R. 766-768), and were compared with the deposit tickets for deposits of checks of corresponding amounts (R. 766).

The Corbetts had accounts in three different banks and in different branches of these banks, and the accounts were in the names of Bill or Gertrude Corbett, Claremont Hotel, Claremont Hotel Change Account, Claremont Hotel Petty Cash Account, and the Corbett Construction Company. Some records, including deposit tickets, of these accounts were introduced by the bank representative into evidence at the trial. The deposit tickets for 1945 for one bank were declared to have been destroyed by that bank. This was testified by the bank official.

In the course of the investigation, Mr. Corbett made available to the agents, McCarthy and Marx, certain of his records. This was done at the hotel at their request. In due course some records were put in

the possession of the agents where they remained throughout the trial (R. 69-71). The records were for the years 1945, 1946 and 1947. No records for the year 1948 were obtained (R. 98). These records remained available at all times to the defendant or his representatives both prior to and during the trial. During the trial all records not introduced into evidence were in the Courtroom in large boxes at counsel table and available for reference of all parties (R. 99). The records received were listed in an exhibit offered but not admitted (Exhibit 9A), a copy of a receipt given Mr. Corbett upon receipt of the records by McCarthy (R. 71, 97). These records included among other records not admitted, 26 books of duplicate deposit tickets (R. 71, 98, 99). *The records were voluminous but all records in the possession of the Government and not put into evidence were in the Courtroom throughout the trial to the knowledge of the defendant.*

Marx testified he *compared the allowance slips in evidence with the deposit tickets of the various accounts of the Corbetts* (R. 766). He testified in detail at Defense Counsel's insistence, as to each allowance ticket in Exhibit 73A which corresponded to a check of equal amount deposited to the Claremont Hotel Account in the Bank of California, giving name, room number, date, amount and bank identification number

in the year 1945. There were 47 items so detailed, totaling \$1,988.88 (R. 767,771).

At that time, defense counsel, Mr. Tracy Griffin said (R. 771):

“As far as I am concerned on this as long as the deposit is to the bank account if he wants to take the totals rather than the detail it is all right with me now.”

Thereafter Marx gave the totals of such allowances compared to corresponding checks deposited to the various banks. Included in the testimony was \$497.14 deposited to the National Bank of Commerce (R. 771).

The records of the *Claremont Hotel Account* of the National Bank of Commerce were introduced into evidence (Exhibits 28 and 29). The duplicate deposit tickets to the *Claremont Hotel Change Account* at the National Bank of Commerce were not introduced into evidence for the years 1945 and 1946. However these duplicate deposit tickets to the *Change Account* were included in the records present in the Courtroom throughout the trial. Later these *two* hotel accounts were transferred to the Peoples National Bank and these records were introduced (Exhibits 34, 35, 36 and 37). The *Change Account* was called the *Petty Cash Account* when transferred to the Peoples National Bank.

There was no cross-examination or further detail requested upon that portion of Marx's testimony (R. 771) but the duplicate deposit tickets were included in Exhibit 9A (the proffered receipt offered but not admitted) in the 26 books of duplicate tickets, and were the basis of the figures to which Marx testified.

Similarly, the duplicate deposit tickets of the tickets destroyed by the bank for the year 1945 were included in those books received by the agent from the defendant. The groundwork had been laid by Mr. Hobart (R. 132) for the introduction of secondary evidence, but as no objection was made as to the manner in which Marx testified of the work he performed, nothing further was introduced into a trial already having a voluminous list of exhibits.

Marx testified from his work papers as was clear to everyone at the trial, including the defense counsel, of work he performed. As the details were great and confusing, only his totals were given. Had there been any question, inquiry could have been made by counsel. Counsel for Appellant now would question the testimony of Marx for authenticity because the allowances identified by Marx as totaling \$497.14 of deposits to the National Bank of Commerce, do not correspond to the National Bank of Commerce account in evidence. Because of the summaries given by Marx, it is

not clear on the record as to which account he was referring. However, it was to other deposit tickets present in the courtroom that his comparison was made. Appellant raises no question of the 47 allowances set forth in detail which are substantiated in the evidence. They would question now the manner in which this evidence was introduced — and to which defense counsel agreed — because similar detail was not set forth.

The second computation by Marx of the deposit tickets was a computation of currency deposited to accounts *other than* the hotel accounts. This computation *was* from *deposit tickets in evidence* as contrasted to the other comparison of *allowance slips in evidence*. As defense counsel requested (R. 774), it was specified that this was a computation by Marx of currency deposited to these accounts from the deposit tickets in evidence (Exhibits 22, 20 and 14). This total was \$96,356.81 during the years 1945, 1946 and 1947 (R. 775). This testimony was also given by Marx from his work papers as was clear to all in the courtroom.

This was an entirely proper method of proceeding. Where records are voluminous and are not in themselves readily understandable by the jury, summaries made according to a method which offers reasonable guaranty of accuracy are admissible, if the

records are available for the purpose of cross-examination and the accuracy of the summary can be checked. This had been held in *Stevens v. United States*, 206 F. (2d) 64, 67; *Augustine v. Bowles*, 149 F. (2d), 93, 96, 97; *United States v. Mortimer*, 118 F. (2d), 266, 269; *Cooper v. United States*, 9 F. (2d), 216, 223.

There could be no basis for prejudice to the defendant in the testimony even if the record is not clear as to the detail of Marx's comparisons, since the records were in the courtroom, cross-examination was available to the testimony of Marx and, finally, as shown by the defendant's own testimony, he was asked about Exhibits 73A, B and C and the allowance slips for which there was a corresponding check deposited. The defendant granted that this happened and said (R. 1035-1036):

"A. I am talking about the checks you have, the Johnston checks, I believe that is called, but on the others I am sure that Mr. Marx knew what he was talking about * * *"

E. Computation and Testimony of Agent in Summary of Government's Case

As its last witness, the Government called Everett D. Holtberg, a special agent, who qualified as an expert witness in the field of accounting. He had been present in the courtroom throughout the trial (R. 793).

He stated he had made a computation from the evidence introduced in the court, of the net income and tax due thereon, for the years 1945, 1946 and 1947. These computations were shown in Exhibit 74, and the exhibit had been duplicated by carbons for the purpose of demonstration to the jury in order that they might follow the witness' testimony. It was subsequently admitted (R. 825). In identification of the exhibit, Holtberg stated that his computation was from the documents and testimony in evidence. He stated that he began with the tax returns of Corbett for the years 1945, 1946 and 1947. He then added amounts of additional income based upon the documents in evidence and subtracted from that an amount for portions of this income recorded on the books to arrive at a total additional net income. He then took Corbett's community half, which was added to the income shown upon the return and computed the tax upon that net income (R. 794).

The exhibit had been offered, and the defense had objected on the ground that it was incompetent, irrelevant and immaterial (R. 793) after which the above identification was made. When asked if there were any further objection, defense counsel stated the explanation was too broad to determine the basis upon which he made his computations (R. 795). The court ruled that it would have to be developed by more de-

tailed examination of the witness but that the copies of Exhibit 74 might be passed to the jury in order that they might more intelligently follow the testimony of the witness. The exhibit was not then admitted but the court instructed the jury it was to be used for the purpose of following the figures and computations the witness gave but that *"the weight and value of this of course will be for your determination when you have heard all the evidence."* (R. 795).

Holtberg then testified upon his computation which had been set out upon the exhibit and the carbon copies used by the jury. In each computation for the years 1945, 1946 and 1947, he began with the information taken from the tax return filed by the taxpayer (Exhibits 1, 3 and 5).

To this, for the year 1945, he added the unreported room rental income of \$20 per day for 184 days or \$3,680. He testified that this figure was Marx's computation from Vowles' testimony. He said nothing further (R. 796). He also added salary from the Claremont Hotel Corp. to Loretta Newton given to Bill Corbett less the withholding tax as testified to by Marx, in the amount of \$295.04. He then added "allowances Claremont Apartment Hotel restored to rental income, total for the year 1945 of \$14,959.84." He stated this was from Exhibits 13, 14, 15, 16, 17,

46, 49, 51, 73, 55, 60 and 72 (R. 797). He then deducted "the unidentified cash overages and transient room rentals restored to income on the books" as Mr. Marx computed and testified in the amount of \$1,465.73. From this computation of net income he computed the tax on a community property basis.

He then computed the net income and tax due for 1946 in the same manner, identifying room rentals from the testimony of Vowles and Marx and the allowances from the same exhibits, with the same deduction of Marx's computation of cash restored to the record. He testified he deducted this cash added to the records because it was unidentified and could be part of the allowances and room rentals added as additional income (R. 800-802).

Similarly, he computed the net income and tax due for 1947, with the same identification of room rentals and allowances (R. 804). He also added unrecorded Corbett Motel receipts of \$12,337.43 identified as being from Exhibit 65, the record introduced by Mr. Birkeland and Mr. Marx's testimony (R. 804).

That was his entire testimony upon direct. The exhibits used for allowances had all been identified as unreported by the clerks, Newton, Krueger and Morgan and by McCarthy. The ledger sheets and allowance slips were in evidence and the manner in

which they were included showed on the exhibits themselves. The erasures, the changes from cash to allowance, the checks proving payment, the irregularities in the daily balance where no entry was made at all—all this had been testified to by witnesses, and with the explanation of the witnesses these facts were self-evident upon the exhibits upon examination. Holtberg simply *computed the totals of these exhibits by years without comment of any kind.*

Similarly, he included the computations of Marx as to rentals not recorded by Vowles, without comment. Similarly, he included the salary checks of Newton, which she said she gave to Corbett, reduced by the tax withheld as testified by Marx. He also included Marx's computation of the Motel rental based upon Exhibit 65, the record proved by Birkeland. In no way did he comment upon any of the evidence or evaluate the testimony of any witness.

Upon cross-examination, he was asked if he had not proceeded upon the basis that none of these allowances were legitimate and he answered yes (R. 808). He was then asked if he investigated to determine how many employees lived at the hotel and he answered no. He was then asked that if any of the allowances were legitimate, they would not then reduce his computation. He answered if any were in the ex-

hibits in evidence that he used in his computation they would (R. 809). He also testified that any additional cash restored to the books and not included by him, if any, would also reduce his computation. Similarly, he testified that if the room rentals were not made as testified by Vowles, his computation would be less. He answered also that if the figures he used were eliminated there would be no additional tax (R. 812). He stated also that he ascertained the allowances for 1946 taken from the exhibits had been used in the allowance journal.

Also on cross-examination, he stated he used Marx's computation for the Corbett Motel income for 1947, and upon further questioning he explained Marx's computation showing the exhibits from which it was made (R. 813-816).

On cross-examination Holtberg was asked for the percentage of the indictment figure the Government had proved in the court (R. 805-806). On redirect he was asked to compare the total allowances taken by the hotel records to the allowances he had included from the exhibits. He was then asked if allowances to employees in any way affected the allowances he used in his computation. Holtberg stated that they might be in the difference between the total allowances taken and the figure he used. He stated allowances to

employees did not affect his allowance figure (R. 820-821).

Holtberg stated that he did not include any allowances he knew to be given to employees. This is not usurping any jury function—the exhibits had been identified by other witnesses and none had said that any of the exhibits included any allowances given to employees. Holtberg, not being the agent who investigated the case, and testifying in summation of his computation, knew of no such allowances and so stated.

This would be identical to the ruling expressed by the United States Supreme Court in *Friedberg v. United States*, 348 U.S. 142, 145, when it was determined that an agent summarizing on redirect evidence introduced at trial upon a negative fact, was not a conclusion of the witness nor invading the province of the jury.

Similarly, Holtberg identified the use of computations made by Marx. Marx computed the nightly room rental by specific numbers of days for each year at the minimum rate given by Vowles. He did nothing further. Vowles had testified to his practice of rentals and estimated the amounts collected daily which he omitted from the records. Marx computed these amounts as he explained and Holtberg used Marx's computation in his own computation.

Holtberg's computations were shown by schedule. This is entirely proper and approved by the courts in complex cases in order that intelligent summaries and computations may be made for the jury. The courts require proper admonition to the jury upon the use of these schedules. The Court fully met the requirements in admonishing the jury that Marx's computation was not evidence when it was given (R. 774, 776, 777, 779) as well as before Holtberg's testimony (R. 795). The court properly instructed the jury concerning the testimony of experts and the use of such schedules in the instructions that he gave (R. 1124-1125, 1128-1129).

The requirements set forth by the Supreme Court for testimony of an expert *from the evidence* and not by hypothesis were met. *United States v. Johnson*, 319 U.S. 503, 519, 63 S.Ct. 1233, 1241, 87 L. Ed. 1546. The court there approved this method and emphatically stated that this did not usurp any function of the jury. This rule has been applied in *Beatty v. United States*, 203 F. (2d) 652, 655; *United States v. Cantor*, 217 F. (2d) 536, 537, and by the Court of Appeals for the Ninth Circuit in *Barcott v. United States*, 169 F. (2d) 929, 931; *Gendelman v. United States*, 191 F. (2d) 993, 996; *Remmer v. United States*, 205 F. (2d) 277, 289, and *Bateman v. United States*, 212 F. (2d) 61, 68.

F. Financial Statements Submitted to Banks

In the course of the investigation, the defendant submitted to the Internal Revenue Service statements that purported to set forth his financial position upon his arrival at Tacoma in 1938, and also his position in 1948. These were mailed by the defendant with an explanatory letter that the statement of 1938 was made by the defendant from memory of transactions which were never recorded (R. 741-742). His letter indicated he had no bookkeeping training, that he reconstructed this statement faithfully and while there may be something he missed, "such oversight is completely unintentional" (R. 743). This statement itemized assets, including cash, cashiers' checks, old coins, money given by his mother as gifts to his children but retained by the defendant, accounts receivable, loans, real properties, cars and trailers, and money left with his parents, all totaling \$112,950, with the gifts to children being shown as \$2,000 worth of liabilities (Exhibit 71, R. 741-745).

The financial statement for December 31, 1948, was represented as prepared by an accounting firm and showed *total assets* of \$1,178,352, and *corresponding liabilities* which reduced his net worth to *only* \$28,021.56 (R. 745-746).

His statements to the Internal Revenue agents of his

financial picture would then support the tax returns he submitted. The Government then offered financial statements given to his banks during the indictment period (Exhibits 27, 31, 38).

These statements to the banks were offered to show the contradictions with the statements to the investigators. They were also offered to show his knowledge of his true financial position and increase in net worth and to show his intent in submitting false statements to the agents and false tax returns (R. 740-741). The court admitted the statements, and the total assets and liabilities of these bank statements were read (R. 746). The bank statements conflicted strongly with the statements to the agents (Exhibits 27, 31, 38 and 71) both in the valuation of assets and particularly in the liabilities detailed in the statement to the agents.

The court instructed that these financial statements should be considered for two purposes only: (1) conflict with statements to the agents, if any, as bearing upon credibility and intent of the defendant in his failure, if any, of reporting income on his returns; (2) knowledge of the defendant's true financial position and of his bookkeeping methods employed for tax purposes. The court instructed the statements should be considered for intent, if any, to conceal in-

come but were not proof of any unreported income (R. 1123-1124).

The United States Supreme Court has ruled that the investigating agencies must explore leads furnished by the taxpayer in *Holland v. United States*, 348 U.S. 121, 127. While this ruling was made in the discussion of the "net worth" method of proof of tax evasion, certainly the Government could not ignore proof explaining any tax deficiency, whatever the subsequent method of proof employed by the Government at trial might be.

Appellant contends that the defense made "basic objection" that the *corpus delicti* had not been established by the net worth method, and so these statements were inadmissible. This must be without weight, as the *corpus delicti* is the proof of the elements of tax evasion, not a method employed. There has been no requirement that such statements be used only in "net worth" cases. The courts have recognized that the Government may proceed by two or more methods of proof of tax evasion in a trial and have sustained conviction even if the net worth method were weak where one method was adequate. *Canton v. United States*, 226 F. (2d) 313, 323.

The Circuit Court of Appeals for the Fourth Circuit directly ruled upon the question here raised by the

appellant in *Beatty v. United States*, 220 F. (2d) 681. In this case the Government introduced two statements given by the defendant to a third party as evidence of his financial position in connection with the purchase of merchandise. These statements were used in the trial to show net taxable income greater than that disclosed upon his returns for the years in question. The defendant contended they were without probative value because the Government did not prove the values shown or make a full net worth method of proof. The court commented upon the recent Supreme Court cases and said that defendant's point might have merit if the Government had proceeded upon the net worth method. However, the Government had shown specific items of omitted income and the financial statements were corroborating evidence of his failure to report all of his income.

That would correspond to the present facts of corroborative statements to the specific items of omitted income, but the statements given by Corbett to the banks would also be properly admissible as statements contradictory to those given the agents in the course of investigation.

G. Cross-Examination of Defendant

1. UPON PRIOR TRANSACTIONS

In the course of investigation, the defendant gave a statement to McCarthy in addition to the financial statements. The testimony of the defendant on direct examination conflicted with the statement to McCarthy, to the financial statements, and to tax returns filed in earlier years.

On direct examination Corbett testified he had no bookkeeping training and no experience in operating rental property prior to acquiring the hotel (R. 863, 865). Cross-examination was then conducted on the basis of his returns for the years 1940 through 1943 (Exhibits 75, 76, 77, 78). These returns were shown to have been *made out by him* and *included detailed expenses of considerable rental properties* (R. 949-963). They showed an increase in realty holdings from two in 1940 to twelve in 1943, although all were shown to be of low value with little return of income. The returns showed during this period that he had paid no tax until 1943 when he paid \$101.40.

The financial statements to the agents claimed a net worth of \$110,950 as of 1938. On direct examination, he testified he came to Tacoma in 1938, and that he "had a little money" and purchased real estate and went into the real estate business (R. 863). On cross-

examination, he was asked if the statement to McCarthy was correct and Corbett stated that "at that time and now" it was correct. He was questioned on the details of this statement of his financial position in 1938 (R. 968).

The statement showed assets on hand or claimed back in 1919 or 1920. Therefore, his petition of bankruptcy in 1925 was offered (Exhibit 79, R. 970). He first did not acknowledge it but later did when confronted with his statement to McCarthy. He was asked if he signed the statement on the petition showing his sole assets to be tools of the value of \$50. He answered he did and that it was correct. He was then asked why assets claimed to have existed from 1919 through 1938, as shown on the statement to McCarthy, were not included on the bankruptcy petition if they were both correct (R. 973-978). His answers were evasive, rambling and amazing in substance as he depicted his early years in sustaining his position that all of his statements were correct. It was during this explanation that the lawsuits were interjected by one of his answers and he subsequently stated he had won 58 out of 63 in the State of Washington (R. 978).

2. CROSS-EXAMINATION OF DEFENDANT UPON SUBSEQUENT TRANSACTIONS

Upon direct examination, defendant Corbett de-

scribed himself as a "substantial trader" with substantial business deals *up to the present time* (R. 931). He described the *sales after the indictment period* of various properties he held during the indictment period, including the Claremont Hotel and the motels (R. 934-937). *He testified on direct* that the Government received \$200,000 in taxes from the trade of the hotel and motels (R. 935). He testified he sold these places at a profit. It was then brought out on cross-examination that this representation of payment of \$200,000 in taxes was to be paid over a forty-year period and that although the sale was in 1951, at a profit, he had not paid any income tax *since 1946* (R. 992-993).

It is entirely proper to go into prior and subsequent transactions from which the intent of the defendant to evade his taxes may be inferred. It is further proper to impeach his statements on direct examination by contradictory statements given at other occasions. *Bateman v. United States*, 212 F. (2d) 61, 66; *Hanson v. United States*, 186 F. (2d) 61, 66.

The best proof that none of this evidence introduced in the Government's case or inquired into on cross-examination was prejudicial or invaded the province of the jury was that the jury deliberated for over eight hours and then returned a verdict convict-

ing the defendant of evading his taxes for the years 1945 and 1946 but acquitting him for the year 1947.

H. Defendant Denied Use of Exhibits Over a Weekend in Course of the Trial

Appellant contends by affidavit of trial counsel that the defendant was unable to prepare the defense in course of trial because he was denied access to the exhibits by the Government. On Friday, December 10, 1954, defense counsel requested permission to withdraw Exhibits 9 and A-1 and take them from Tacoma to Seattle. Counsel for Government also requested access to these exhibits during the weekend. Defense counsel wanted to take the exhibits to Seattle so he would not have to come back to Tacoma. The court suggested defendant set a definite time and an Assistant of the United States Attorney's office would take them to Seattle for defendant's accommodation. Further discussion was held and the Court authorized removal of the exhibits under a plan mutually agreeable to both sides. It was agreed that Marx would deliver Exhibits 9 and A-1 to defense counsel in Seattle about 3:00 o'clock Saturday afternoon (R. 703-705). The Government used the exhibits Saturday morning in preparing for final computations of the agents. They were then delivered by Marx to Mr. Griffin's office in Seattle at about 2:00 o'clock Saturday after-

noon. (See affidavit of Marx in answer to affidavit of Mr. Griffin.) Defense had the exhibits from that time until trial reconvened at 1:15 P.M. Monday afternoon, when they were returned to the clerk. The Government did not rest till 11:00 A.M. Tuesday. Defense had access to these records until they began their defense on Tuesday afternoon. Murta testified she used these records over the weekend in her appearance as a witness for the defense Tuesday afternoon (R. 854). Corbett testified he used the exhibits himself (R. 902). Nowhere in the trial is there a claim that the defense did not have time to prepare its case. Rather it appears that the defense witnesses had equal opportunity with the Government to make full use of the records.

CONCLUSION

The appellee respectfully submits that the appellant was convicted upon substantial evidence, was not prejudiced by any occurrence at the trial, including all rulings and instructions given by the trial court. The judgment of the court below should be sustained.

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In the United States Court of Appeals
for the Ninth Circuit

BILL CORBETT, Appellant

v.

UNITED STATES OF AMERICA, Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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**In the United States Court of Appeals
for the Ninth Circuit**

Docket No. 14801

BILL CORBETT, Appellant

v.

UNITED STATES OF AMERICA, Appellee

**UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION**

REPLY BRIEF OF APPELLANT

The brief for the Government in this Court follows the same tactics used by counsel for the Government at the trial: namely the glossing over of failures of proof by continued positive restatement of incorrect generalizations as to the facts and by stressing collateral matters as showing bad intent. These tactics, accompanied by the introduction in mass exhibits of hundreds of documents which, without specific testimony so establishing, were totaled as omitted income, concealed not only to the Court and jury below, but to defendant's trial counsel as well, the failure of proof and impropriety of evidence involved. The Government here even attempts to use this fact as an argument in its favor (Gov't. br. 27).

I

GOVERNMENT FAILED TO PROVE UNREPORTED
INCOME

Perhaps the most vital of the incorrect generalizations in the Government brief is the constantly reiterated statement that "the Government proved \$14,959.84 in 1945 and \$17,542.83 in 1946 specifically as being false claims for bills that had actually been paid." (Gov't. br. 28: see pp. 13, 33, 43 and also p. 8 where the totals of allowance slips introduced, before deducting even those restorations of income testified to by Marx, are stated to be reductions of income). No attempt is made by the Government to give a detailed answer to the careful analysis in our opening brief of the evidence on this point.

The point at issue is the amount of allowances proved beyond a reasonable doubt to have been received by defendant rather than actually given to guests or employees. The Government's brief by generalizing testimony attempts to infer that all the allowances were for the entire amount of the bill (Gov't. br. 7). The evidence referred to was simply general testimony as to what sometimes happened and had no reference to any particular allowances. That a large proportion of the allowances were not of the entire bill is disclosed by examination of the ledger sheets in evidence. Moreover, there was testimony that legitimate allowances of the entire amount of the bill were given (R. 388-389, 787, 884-885, 906-909).

The Government brief (p. 9) states that prior to trial

Morgan, Krueger and Newton “went through” those guest ledger sheets that were in the possession of the agents and segregated those that they could identify by entries in their own handwriting. However, the fact is that Morgan identified only the few items shown in exhibit 13 and summarized in Appendix B of our opening brief; Krueger identified the few allowances shown in exhibit 14 as in her writing, but testified she did not know whether the guests received the allowances (R. 213); and Newton’s testimony as to exhibit 15 was that the agent segregated them and showed them to her and she examined “several”. (R. 398-399).

The Government brief (pp. 9-10) states:

“Segregation of ledger sheets and allowance slips were also made by Mr. McCarthy, an Internal revenue agent, of those instances where an entire bill was given as an allowance, where the cash entry was erased or no entry at all made, and where allowances corresponded in amount to checks deposited in bank accounts the following day (R. 748-750). These, in addition to exhibits also identified by other witnesses, were Exhibits 16, 72A, 72B, 72C, 73A, 73B and 73C (R. 108, 753-757).”

The fact is that McCarthy testified he sorted ledger sheets into various categories— (1) where allowances were made for entire bill, (2) where there were erasures, and (3) where there were pink slips but no writing on guest ledger sheet (R. 748-749). These ledger sheets were

not put in evidence with this "sort", however. In fact, McCarthy immediately stated that he had consolidated the documents where allowances were of the entire bill with those where ledger sheets showed erasures. (R. 749). Further, he testified that he had taken these and made another "sort" just before trial (R.749). This segregation was to associate ledger sheets with pink slips in the cases of sizable allowance slips where no writing appeared in either the cash or allowance column of the ledger sheet and further in cases where the entire bill had been allowed (R. 753). Also, he corrected himself by saying that he had not personally made all of these segregations, he had directed that it be done by persons in his office (R. 749). He also was assisted in doing this by former agent Marx and by Government counsel Obenour (R. 754). Actually, he himself did not make the segregation but the documents were segregated and attached and handed to him (R. 754).

All of this testimony was in general terms not having any stated relationship to any particular exhibit either offered or about to be offered. McCarthy then testified, with apparent reference to bunches of documents about to be introduced which had not been marked, that the documents were segregated by years "as to allowances being given where no writing appears on the ledger sheet, where the full amount of the bill has been given by allowance", and in some instances also "where cash appears in the cash column but no allowance has been made." (R. 755). Three bunches of documents were

then marked as Exhibits 72-A, 72-B and 72-C and admitted (R. 755-756).

McCarthy stated there was another segregation (R. 756). Three additional bunches of documents were then marked as exhibits 73-A, 73-B and 73-C and admitted without further testimony as to their nature except that they were obtained from defendant (R. 756-757).

From this testimony it is impossible, we submit, to ascertain exactly what the ledger sheets and allowance slips so introduced were supposed to establish. We cannot tell from the testimony which manner of segregation applies to the exhibits introduced nor can we tell whether McCarthy's testimony applies to exhibit 72 only or to both exhibits 72 and 73. There is in this "identification" by McCarthy nothing to show beyond a reasonable doubt that the guests did not receive the benefit of the allowances shown in the documents.

As we pointed out in our opening brief, a large number of the ledger sheets introduced which do show allowances are of the nature of credits on the accounts of long staying guests not occurring at the time of checking out. These are the type testified to by guests Cole and Beers who received large allowances reducing their charges to what they understood to be O. P. A. ceilings. (See R. 873-879).

Another example of the type of incorrect generalization which the government used at the trial is shown on pages 12 and 13 of the Government's brief. After referring to testimony of Bauman introducing a few fumed cash sheets, the Government quotes Corbett's testimony that with his

help they could have gone through all the cash sheets of the hotel for these years in less than a week and picked out all cash sheets that had eradications on them. Then the brief immediately states (p. 13);

“Special Agent Holtberg computed these allowances from exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 72 and 73 and they totaled \$14,595.84 in 1945 and \$17,542.83 in 1946.”

This gives the impression that the government had established erased cash sheet entries for all of the allowances shown on all these exhibits, when nothing could be further from the truth. Bauman showed 19 cash receipt entries which had been altered and which tied in with allowances. Corbett's statement that he could have examined all the hotel's cash sheets for these years in a week and picked out all the cash eradications which tied in with allowances does not establish what further number there would have been, if any.

The Government brief states (p. 20) that Marx compared the allowance slips in exhibits 72-A, B and C with deposit tickets and found checks in the same amount as allowances in a total of \$18,000 in 1945, 1946 and 1947. He did not so state. He stated only that the totals of 72-A, B. and C were \$8,255.76 in 1945, \$4,431.87 in 1946 and \$3,314.24 in 1947, saying nothing about finding any identical check deposits (R. 772).

15 the Government (br. 28-29) admits that Newton did

In discussing Newton's testimony concerning exhibit

not testify concerning all the allowances in exhibit 15 but only some particular ones. Nevertheless the government goes right on to say that each sheet (in exhibit 15) contained an improper allowance and only these improper allowances were included in the government computation, despite the fact that there was no testimony establishing that any of these allowances were improper except the particular ones mentioned by Newton.

There is, we submit, no refutation of the point made in our opening brief that there was not testimony here from which it could be held beyond a reasonable doubt that Corbett, and not the guests or employees, had received the benefit of allowances except to the extent of \$803.69 in 1945 and \$2,756.98 in 1946 (before dealing with Marx's testimony as to check deposits matching allowances in exhibits 73-A and B). The only new item of proof brought out in the Government brief which would affect these figures is that \$100.00 should be added in 1945 for the store rental mentioned on p. 11 of the Government brief (R. 407, 453-454).

In several places the Government brief argues that the O.P.A. could not have been the reason for manipulation of defendant's records because his application for an increase was stamped "approved—Sept. 2, 1944". This ignores Corbett's own testimony that the application had been held in the O.P.A. offices until 1946 and did not come to light until a Federal District Court injunction suit was brought against him in 1946, at which time he told them

he had filed an application two years previously and they found it in the O.P.A. offices (R. 1006-1007).

Concerning the night rentals by Vowles omitted from the income records, the Government concedes that these were entered in income while Corbett was away in 1945 and 1946 (Br. 32). These trips apparently were lengthy, as pointed out in our opening brief (p. 20). This fact, alone, shows conclusively that the testimony of Holtberg, both by exhibit and orally, as to the income of defendant was erroneous and did not truly reflect the Government's own evidence. Holtberg included the night rentals as computed by Marx, who included \$20 per night for every night from July 1, 1945 to December 31, 1945, and every night during the entire year 1946 (R. 777).

Beyond this, however, as developed in our opening brief, the entire use of \$20 per night is improper in light of Vowles testimony as to his \$7,200 written record. The Government brief states (p. 32):

“The Government used the minimum figure given as his average, of \$20 per night. This is substantiated by the testimony of the other clerks who all saw these receipts given to Corbett by overages or envelopes.”

No record citations are given to support this statement, which is understandable because no one other than Vowles testified as to the amount of the night rentals, and the \$20.00 figure was unsupported by anything other than his estimate.

Another example of the same tactics is found on the same page of the Government brief (p. 32). Following the statement that "Vowles said he rented from one to seventeen rooms every night," the Government brief states:

"In addition he rented fifteen cots to servicemen for \$1.00 each. (R.609). All of these receipts were omitted from the cash sheets and given to Corbett (R. 609)."

This statement can only be taken as meaning that Vowles received \$15.00 every night from rental of cots to servicemen which was unreported. Vowles' actual testimony concerning the number of cots was (R. 609):

"At one time we had fifteen."

There was no testimony as to how many cots were actually rented.

Concerning the restorations to income, the Government states there is nothing to support our contention that there was \$200.00 restored to the cash sheets and \$410.00 to the cash received journals in 1945 above Marx's figures (Br. 33). These are shown by entries in the exhibits themselves as set out in our opening brief (pp. 13-14). Also objection is made to our inclusion as restoration to income of the amounts included on the returns as wagering income (Gov't br. p. 34). The objection is that defendant was vague in describing it. However, Corbett had described it to the accountant at the time as "Cash Over", the same

description as the other restorations to income, and this still appeared in writing on the original work sheet (R. 683-684).

With regard to Marx's testimony purportedly based on Bank of California deposit tickets in evidence, which we pointed out in our opening brief were not in evidence, the Government contends that the tickets were present in boxes in the Court Room although not introduced in evidence. There is nothing to establish this fact in this record. The brief argues that defendant should have objected to Marx's testimony. But where a revenue agent gives the Court to understand that his statements are based on documents in evidence, the defendant cannot be required to assume the untruth of this statement and stop the trial and examine all the exhibits at the peril of otherwise waiving his objections to the incorrect testimony. The burden is on the Government to establish its case by competent evidence beyond a reasonable doubt.

The Government cites *Stevens v. United States* (C.A. 6), 206 F. (2d) 64, 67; *Augustine v. Bowles* (C.A. 9), 149 F. (2d) 93, 96, 97; *United States v. Mortimer* (C.A. 2) 118 F. (2d) 266, 269; *Cooper v. United States* (C.A. 8) 9 F. (2d) 216, 223, to support argument that summaries of documents not introduced are proper where the documents themselves are presented to counsel for defendant and made available for introduction and for cross-examination. See also on this point *Wilkes v. United States* (C.A. 9), 80 F. (2) 285, 291 and *Willapoint*

Oysters v. Ewing (C.A. 9), 174 F. (2d) 676, 691. None of these cases involve a situation where the government witness caused the Court and counsel to believe he was merely summarizing the exhibits already in evidence. In all of these cases attention was called at the time to the unadmitted exhibits being summarized and the exhibits were then made available to defendant's counsel for cross-examination and to introduce if desired. For example, in the *Augustine* case the trial court continued the trial for a week to give defendant time to examine the summarized exhibits. Here there is no showing in the record that the documents being summarized were available and even if they were, no opportunity to examine them in connection with this testimony was given because the witness did not purport to summarize anything except what was already in evidence.

As to the 1945 allowances which Marx testified he had matched with 1945 National Bank of Commerce deposit tickets in evidence but which as we brought out in our opening brief (p. 29) do not match, the Government apparently contends that Marx was testifying on the basis of some 1945 National Bank of Commerce tickets not put in evidence rather than on the basis of the particular 1945 National Bank of Commerce tickets which were put in evidence (Gov't. br. 37). Again they contend these other tickets were present in a box in the courtroom, but there is nothing in the record to support this assertion and the impression was given that only the exhibits in evidence were being summarized.

The Government argues that Marx did not purport to be summarizing deposit tickets in evidence when he was testifying concerning check deposits (Br. 39). However, the excerpts from the testimony and remarks of the Court, set out in our opening brief (pp. 26-28) show clearly that his testimony caused all parties to understand he was summarizing exhibits in evidence and the court so advised the jury with no correction by Marx or Government counsel.

II

HOLTBERG INVADED THE JURY'S FUNCTION

In response to the second main portion of our argument, to the effect that the testimony of Holtberg invaded the function of the jury, the Government argues that Holtberg simply computed the totals of the allowance slips in evidence without comment of any kind (Br. 44). This is not true. If he had done this and simply stated that the total of all allowance slips in evidence was so many dollars, there would be no objection to his testimony. But he went much further. He testified orally, and also in effect by exhibit 74, that all of these allowances went to the benefit of defendant and not to the guests or employees and constituted taxable income to the defendant. This testimony required, not merely a total of the allowance slips in evidence, but the further inference or speculation that none of the allowances included in this total was

legitimate and was received by a guest or employee. This inference or speculation was not merely an accounting summary of evidence introduced. Nor was it merely a legal or accounting conclusion as to the taxable nature of facts established by the evidence. It was an inference or speculation as to whether the evidence introduced was sufficient to establish that all of these allowances were illegitimate. This was a crucial factual issue in the case and defendant was entitled to have it determined by the jury without having the determination made for them from the stand by a government witness who himself was testifying on the basis of simply hearing the same evidence they did.

In arguing this point, the Government brief again misstates the testimony. On p. 46 it states that Holtberg testified that he did not include any allowance "he knew to be given to employees". His testimony was not qualified or conditioned on what "he knew". It was (R. 821):

Q. Were any allowances to guests, to employees in any way included in the figure you have used?

A. No, sir."

Various cases are cited on pp. 46 and 47 of the Government's brief as showing that testimony like Holtberg's was permissible. They include cases cited in our opening brief and establish the general rule that an expert can give an accounting summary in these cases.

In *Friedberg v. United States*, 348 U. S. 142, 145, the

Agent stated in answer to a question on cross-examination "there was no evidence available to show there was cash." On redirect he explained this by pointing out the evidence and stating that he could see no reason why he should include cash on hand at the starting point. The Supreme Court upheld this testimony on the ground that the Agent had simply testified that he found no evidence of cash.

Holtberg, here, did not merely summarize evidence showing why he did not include some item. He testified positively that all of the allowances he did include (which were all of the allowances in evidence) were income to the defendant, that defendant had received the benefit of them, and that guests and employees had received no benefit from them.

There is nothing in the opinion in *United States v. Johnson*, 319 U.S. 503, indicating that an expert witness for the Government may, simply on the basis of having listened to the evidence, tell the jury that all the allowances went to the benefit of defendant and none went to the benefit of guests and employees, when the records in evidence show the contrary and his conclusion is based on inference or speculation. In the *Johnson* case, as examination of the Circuit Court opinion shows (*United States v. Johnson*, (C.A. 7), 123 F. (2d) 111, 126), the Government accountant was testifying only to summaries of precise entries in exhibits and books of account.

Nor do any of the Circuit Court cases cited by the

Government (br. 47) hold that an expert witness may testify to conclusions on the factual issue before the jury based on his own inferences from hearing the testimony. Those cases are like that of *Remmer v. United States* (C.A. 9), 205 F. (2d) 277, where this Court permitted an expert to tabulate the increase in net worth shown by the evidence. Such a tabulation is by its nature a compilation of specific items of property shown by the evidence and does not involve inference or speculation from which a positive conclusion is testified to which is contrary to the purport of the documents being summarized.

III

FINANCIAL STATEMENTS AND EVIDENCE BASED THEREON IMPROPERLY ADMITTED

The Government argument on the financial statements and cross-examination of defendant as to years and items long removed from and having no relevance to the case is a pyramid based on the introduction by the Government of defendant's statements of his 1938 and 1948 net worth, sent to the agents at their request. The financial statements to the banks were proper, it is argued, to show that defendant's statements to the agents were false. Also the cross-examination as to completely irrelevant matters twenty years and more before the indictment period was necessary, it is argued, to show that defendant's 1938 net worth statement was false.

We submit that the pyramid should fall because its foundation was defective. Defendant's statement of 1938 and 1948 net worth was introduced, not by defendant, but by the Government in its case in chief. It was entirely improper and particularly the 1938 net worth statement. These financial statements proved nothing relevant to the issue of whether defendant had received certain specific items of income in the years involved. They were not admissions of any relevant fact. They did not even show any increase in net worth between 1938 and 1948. On the contrary, they showed a decrease. Thus they in no way showed knowledge of what the Government contended was defendant's "true financial position". Their only purpose was to attempt to impeach and discredit defendant on collateral matters as a part of the Government's own case before he ever took the stand or presented any testimony.

The government argues that defendant's objection to these documents on the ground that they were incompetent, irrelevant and immaterial until the *corpus delicti* was established was insufficient because the government contends that it proved the elements of tax evasion even though not by the net worth method. However, these net worth statements made by defendant could be relevant, if at all, only to a net worth case, not to a specific item prosecution. When the Government failed to proceed on a net worth basis it thereby failed to introduce evidence

making defendant's net worth statements relevant and the objection was well taken.

Government counsel seems to argue that any statements given by the defendant to the agents during the investigation that the government thinks can be contradicted by other evidence are admissible as a part of the Government's case irrespective of whether the statements are relevant to the issue sought to be proved. This is contrary to the most basic rules of evidence in criminal cases.

The Government's brief (p. 52) states that on direct examination Corbett testified that he had no experience in operating "rental property" prior to acquiring the hotel and that some of the cross-examination was relevant to disprove such statement. The question asked Corbett actually was whether he had had experience in the operation of any hotel, motel or lodging house. (R. 865). He had, in fact, testified that he had been in the real estate business (R. 863). Nevertheless on the theory that defendant's tax income returns for 1940-1943 showing income from rented real estate (no hotels, motels or lodging house) impeached defendant on this testimony, the Government was permitted to go into these returns in detail (R. 949-963) and to state in final argument that defendant had said he had no prior experience when the returns showed he had all that string of property that he had rented (R. 1093).

When defendant, faced with the introduction by the

Government in its own case of both his statement to the agents of net worth in 1948 on a cost basis and his statement to the banks of net worth on a fair market value basis, tried to explain the fair market value of the Claremont hotel (R. 933-934), the Government seized on this as permitting cross-examination as to defendant's transactions and tax returns for years subsequent to the indictment period. (See Gov't. br. 54). In discussing the Claremont hotel which had been sold on long-term contract after the indictment period, the defendant testified that the government "gets" \$200,000 in taxes (R. 935-936). The taxes were payable on the installment basis when payments were made over the period of the contract (R. 993). With its same lack of respect for accuracy where it desires to create an effect, the Government tells this Court that defendant testified that the Government "received" \$200,000 in taxes (Gov't. br. 54).

The Government cites *Canton v. United States* (C.A. 8), 226 F. (2d) 313 and *Beatty v. United States* (C.A. 4), 220 F (2d) 681, as supporting the introduction of this evidence. These cases hold that the Government may proceed simultaneously on the net worth and specific items methods. They do not hold that, where no attempt is made to show an increase in net worth between the beginning and end of the indictment period, the Government may introduce financial statements made by defendant for dates having no relationship to the beginning and end of the indictment period and showing no increase in net worth even for the longer period they do cover,

simply for the purpose of discrediting defendant by laying the groundwork for introduction of other evidence also entirely collateral and irrelevant.

Respectfully submitted,

F. A. LESOURD

BROCKMAN ADAMS

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United States
Court of Appeals
for the Ninth Circuit

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur", together with their labeling, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

No. 14802

United States
Court of Appeals
for the Ninth Circuit

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur", together with their labeling,

Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California. Central Division

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

Civil No. 14482-WB

UNITED STATES OF AMERICA, Libelant,
vs.

75 Articles of Device, more or less, designated as
“The Schlessing Ultrasoniseur”, together with
their labeling, Respondents.

LIBEL OF INFORMATION

To the Honorable Judges of the United States District Court for the Southern District of California:

Now comes the United States of America, by Walter S. Binns, United States Attorney for the Southern District of California, and shows to the Court:

1. That this Libel is filed by the United States of America, and prays seizure and condemnation of certain articles of device together with their labeling as hereinafter set forth, in accordance with the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301, et seq.).

2. That A. Schlessing and Company, Inc., shipped in interstate commerce from St. Louis, Missouri, to Perfect Health Institute, at Los Angeles and Santa Monica, California, and to other consignees located within the jurisdiction of this Court, via Railway Express Agency and other means, during the period from July 1, 1951, to September 4, 1952, 75 articles of device, more or less, designated “The Schlessing Ultrasoniseur”. [2]

3. That the aforesaid articles of device, when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, were accompanied by certain labeling, including the following items of written, printed, and graphic matter, which contain statements relating to said articles of device and which constitute an essential part of the distributional scheme to promote the sale of said articles:

(a) Pamphlets entitled "Therapeutics by Ultrasonics".

(b) Leaflets entitled "Please Read Carefully. The Schlessing Ultrasoniseur * * *"

(c) Leaflets entitled "that they may WALK again * * *"

(d) Sheets entitled "Reports on Ultrasonic Physical Medicine from American Users".

(e) Form letters from A. Schlessing and Company headed, "Dear Doctor: * * *"

(f) Guarantees and order blanks regarding Schlessing Ultrasoniseur.

4. That the aforesaid articles of device, when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, were misbranded within the meaning of 21 U.S.C. 352(a) in that said labeling when taken as a whole as well as through specific claims, and in the setting in which it is presented, contains statements which represent and suggest that the said devices provide an adequate and effective treatment for the cure of "abscesses, arthritis, arthrosis deformans, asthma bronchiale, morbus bech-

terew, bronchiectasy, claudicato intermittens, furunculosis, sciatica, carbuncle, lumbago, mastitis, myalgia, panaritium, paronychia, periarthritis, humeroscapularis, phlegmones, prostata hypertrophy, sinusitis maxillaris, ulcus cruris, effusions of the joints, abscesses of perspiratory glands, gingivitis, stomatitis, paradentosis, pulpitis, infiltrations, especially granulomas, bursitis, Dupuytren's contracture, endangitis obliterans, fistulae, lymphangitis, paronychia, polyarthritis rheumatica, postoperative pains, morbus raynaud, tendovaginitides, trigeminal neuralgiae, thrombophlebitides, ulcus ventriculi," kidney stones, spinal arthritis, gum boils, kidney colic, gastric ulcer, and asthma, which statements are false and misleading. [3]

5. That the aforesaid articles of device, when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, were further misbranded within the meaning of 21 U.S.C. 352(a) in that the following statements contained in their labeling are false and misleading:

Leaflets entitled "Please Read Carefully"

"This Machine Is Absolutely Safe"

Leaflets entitled "that they may WALK again

* * *

"Is the Schlessing Ultrasoniseur Difficult to Operate?"

"Not at all. The technique if (sic) the very simplest. No special skill, no involved instructions and no long experience is necessary to use the Schlessing Ultrasoniseur properly."

“Is the Schlessing Ultrasoniseur Safe?

“Yes. With ordinary precautions. Ultrasoniseur treatments are absolutely painless. There are no contra-indications. No danger of deep burns, tissue damage or irritation. Equally important, there are no possible harmful effects to the person administering treatment.”

6. That the aforesaid articles of device, when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, were also misbranded within the meaning of 21 U.S.C. 352(f)(1) in that their labeling fails to bear adequate directions for use for the purposes for which they are intended.

7. That the aforesaid articles of device, when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, were adulterated within the meaning of 21 U.S.C. 351(e) in that their strength differs from and their quality falls below that which they purport and are represented to possess, since their ability to produce total sound output (ultrasonic) differs materially from the ability which they are represented to possess and the output meter (dosimeter) does not accurately gauge the energy density output of said articles. [4]

8. That the aforesaid articles and labeling are in the possession of Perfect Health Institute, 636 South Broadway, Los Angeles, and 309 Santa Monica Boulevard, Santa Monica, and elsewhere within the jurisdiction of this Court.

That by reason of the foregoing, the aforesaid

articles including their labeling are held illegally within the jurisdiction of this Court and are liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C. 334.

Wherefore, Libelant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid articles of device including their labeling; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid articles of device including their labeling and grant Libelant the costs of this proceeding against the claimant of the aforesaid articles; that the aforesaid articles of device including their labeling be disposed of as this Court may direct, pursuant to the provisions of said Act; and that Libelant have such other and further relief as the case may require.

Dated: September 5, 1952.

WALTER S. BINNS,

United States Attorney

CLYDE C. DOWNING,

Asst. U. S. Attorney, Chief, Civil
Division

/s/ TOBIAS G. KLINGER,

MAX F. DEUTZ,

Asst. U. S. Attorneys,

Attorneys for Libelant

[5]

[Endorsed]: Filed September 5, 1952.

[Title of District Court and Cause.]

CLAIM OF A. SCHLESSING

Now appears before this Honorable Court, A. Schlessing, 3521 Lindell Boulevard, St. Louis 3, Missouri, intervening in this proceeding as the duly authorized agent of the owners and consignees of the devices under seizure, and also as the president of A. Schlessing and Company, Inc., which manufactured said devices, and makes claim to said articles as the same are attached by the United States Marshal for this District under process of this Court at the instance of the United States of America, libelant;

And said claimant avers he has been duly authorized by all the owners and consignees of the said devices to act as their duly authorized agent in this proceeding;

Wherefore he prays to defend accordingly.

/s/ A. SCHLESSING [6]

Duly Verified. [7]

[Endorsed]: Filed October 22, 1952.

[Title of District Court and Cause.]

CONSENT DECREE OF CONDEMNATION

On September 5, 1952, a Libel of Information against the above described articles was filed in this Court on behalf of the United States of America by the United States Attorney for this District. The

Libel alleges that the articles proceeded against are devices which were shipped in interstate commerce and which are adulterated and misbranded in violation of the Federal Food, Drug, and Cosmetic Act. Pursuant to Monition issued by this Court, the United States Marshal for this District seized 47 of said articles together with their labeling consisting of various items of literature. Thereafter, A. Schlessing of St. Louis, Missouri, intervened as a claimant in this proceeding. Claimant consents that a Decree, as prayed for in the Libel, be entered condemning the articles under seizure.

The Court being fully advised in the premises, it is on motion of the parties hereto—

Ordered, Adjudged, and Decreed that the articles of device under [8] seizure are adulterated and misbranded as alleged in the Libel in violation of 21 U.S.C. 351(c), 352(a), and 352(f)(1), and are therefore hereby condemned pursuant to 21 U.S.C. 334 (a); and it is further

Ordered, Adjudged, and Decreed, pursuant to 21 U.S.C. 334(e), that the United States of America shall recover from said Claimant court costs and fees, (and storage and other proper expenses, as taxed herein) to wit, the sum of \$35.00; and it is further

Ordered, Adjudged, and Decreed that the United States Marshal for this district shall deliver all of the aforesaid literature to a representative of the U. S. Food and Drug Administration for investigational and exhibit purposes; and

Claimant having petitioned this Court that the

condemned articles of device (without the aforesaid literature) be delivered to him pursuant to 21 U.S.C. 334(d), it is further

Ordered, Adjudged, and Decreed that the United States Marshal for this district shall release said articles (without the aforesaid literature) from his custody to the custody of the Claimant for the purpose of attempting to bring said articles into compliance with law, if the Claimant, within 20 days from the date of the Decree (a) pays in full the aforementioned court costs and fees, and pays to the United States Marshal all storage and other proper expenses of the proceeding herein, and (b) executes and files with the Clerk of this Court a good and sufficient penal bond with surety in the sum of Thirty Thousand Dollars (\$30,000.00), approved by this Court, payable to the United States of America, and conditioned upon the Claimant's abiding by and performing all the terms and conditions of this Decree and of such further Orders and Decrees as may be entered in this proceeding; and it is further

Ordered, Adjudged, and Decreed that:

(1) After the filing of the bond in this Court, the Claimant shall at his own expense cause the said articles of device to be shipped to his place of business at 3521 Lindell Boulevard, St. Louis 3, Missouri. When the articles arrive there, Claimant shall give written notice to the St. Louis District, Food and Drug Administration, Federal Security Agency, Room 1007 New Federal [9] Building, 1114 Market Street, St. Louis 1, Missouri, that the articles have

arrived and that the Claimant is prepared to attempt to bring them into compliance with law under the supervision of a duly authorized representative of the Federal Security Administrator.

(2) The Claimant shall at all times, until the articles have been released by a duly authorized representative of the Federal Security Administrator, retain intact the entire lot comprising said articles for examination or inspection by said representative, and shall maintain the records or other proof necessary to establish the identity of said lot to the satisfaction of said representative.

(3) The Claimant shall not commence operations for bringing the articles into compliance with law, or otherwise altering their condition or identity, until he has received authorization to do so from a duly authorized representative of the Federal Security Administrator.

(4) The Claimant shall at no time, and under no circumstances whatsoever, ship, sell, offer for sale, or otherwise dispose of said articles or any part of them until a duly authorized representative of the Federal Security Administrator shall have had free access thereto in order to take any samples or make any tests or examinations that are deemed necessary, and shall in writing have released such articles for shipment, sale, or other disposition. Claimant shall make no distribution of said articles or any part of them except in strict accord with such terms and conditions as may be included in said written release.

(5) Within six months from the date of the filing

of the bond in this Court, Claimant shall complete the process of bringing said articles into compliance with law under the supervision of a duly authorized representative of the Federal Security Administrator.

(6) The Claimant shall abide by the decisions of said duly authorized representative of the Federal Security Administrator, which decisions shall be final. If Claimant breaches any conditions stated in this Decree, or in any subsequent Decree or Order of this Court in this proceeding, Claimant shall return the articles immediately to the United States Marshal for this district [10] at Claimant's expense, or shall otherwise dispose of them pursuant to an Order of this Court.

(7) The Claimant shall not sell or dispose of said articles or any part thereof in a manner contrary to the provisions of the Federal Food, Drug, and Cosmetic Act, or the laws of any State or Territory (as defined in said Act) in which they are sold or disposed of.

(8) The Claimant shall compensate the United States of America for cost of supervision at the rate of \$3.00 per hour per representative for each hour actually employed in the supervision of the aforesaid operations, as salary or wage; where laboratory work is necessary, at the rate of \$3.50 per hour per person for such laboratory work; where subsistence expenses are incurred, at the rate of \$9.00 per day per person for such subsistence expenses. Claimant shall also compensate the United States of America for necessary traveling expenses

which may be incurred in connection with the supervisory responsibilities of said Federal Security Administrator.

(9) If requested by a duly authorized representative of the Federal Security Administrator, Claimant shall furnish to said representative duplicate copies of invoices of sale of the released articles, or shall furnish such other evidence of disposition as said representative may request.

The United States Attorney for this district, on being advised by a duly authorized representative of the Federal Security Administrator that the conditions of this Decree have been performed, shall transmit such information to the Clerk of this Court, whereupon the bond given in this proceeding shall be canceled and discharged; and it is further

Ordered, Adjudged, and Decreed that if the Claimant does not avail himself of the opportunity to repossess the condemned articles in the manner aforesaid, the United States Marshal for this district shall retain custody of said articles pending the issuance of an order by this Court regarding their disposition; and it is further

Ordered, Adjudged, and Decreed that this Court expressly retains jurisdiction to issue such further Decrees and Orders as may be necessary to the proper disposition of this proceeding, and that should the Claimant fail [11] to abide by and perform all the terms and conditions of this Decree, or of such further Order or Decree as may be entered in this proceeding, or of said bond, then said bond shall on motion of the United States of America in

this proceeding be forfeited and judgment entered thereon.

Dated: October 22, 1952.

/s/ WM. M. BYRNE,
United States District Judge

We hereby expressly consent to the entry of the foregoing Decree.

WALTER S. BINNS, U. S. Attorney
CLYDE C. DOWNING, Asst. U.S. Attorney,
Chief of Civil Division,

/s/ TOBIAS G. KLINGER, Asst. U.S. Attorney
Attorneys for Libelant.

/s/ A. SCHLESSING, Claimant,

/s/ SPENCER E. VAN DYKE,

Attorney for Claimant. [12]

[Marginal Note]: Modified by Stip. & Ord. fd. 10/20/53 & Dktd. & ent. 10/22/53. E. L. Smith, Clerk, by C. A. Simmons, Deputy.

[Endorsed]: Judgment entered and filed October 22, 1952.

[Title of District Court and Cause.]

STIPULATION AND ORDER SCHEDULING FURTHER COURT PROCEEDINGS

It is hereby stipulated by the parties to this proceeding, through their respective counsel, as follows:

(1) In attempting to carry out the terms of the

Consent Decree of Condemnation filed in this cause on October 22, 1952, the parties are not in agreement as to whether certain action proposed by the Claimant would be in compliance with law.

(2) This disagreement hinges upon an interpretation of the Chiropractic Act of the State of California, and should be resolved by this Court.

(3) To facilitate an orderly and thorough presentation of this matter without offering any oral testimony, it is agreed that upon approval by this Court the parties will adhere to the following schedule for the filing of papers with the Clerk of the Court:

(a) May 24, 1954. Claimant will file a motion to compel administrative approval of Claimant's proposed method of distribution of [13] those devices under seizure which have been satisfactorily reworked from a physical standpoint. Together with this motion, there will be filed a stipulation of pertinent facts which are not in dispute, a stipulation as to the precise issues before the Court, and affidavits in support of Claimant's motion if Claimant feels that affidavits are necessary.

(b) June 21, 1954. Libelant may file such affidavits as it deems advisable.

(c) July 19, 1954. Claimant will file his opening brief.

(d) August 16, 1954. Libelant will file its answering brief.

(e) August 30, 1954. Claimant may file a reply brief.

(f) September 27, 1954. Oral argument will be held before the Court at 2 p.m.

(4) The "Stipulation and Order Extending Time for Compliance with Decree", entered by this Court on October 20, 1953, may be modified to suspend the time limits within which the devices under seizure may be brought into compliance with law, pending further order of this Court after the instant issue has been adjudicated.

Dated: April 14, 1954.

LAUGHLIN E. WATERS,

United States Attorney

/s/ MAX F. DEUTZ,

Asst. U. S. Attorney, Chief of Civil
Division

Attorneys for Libelant

/s/ SPENCER E. VAN DYKE,

/s/ JACK HILDRETH,

Attorneys for Claimant

It Is So Ordered this 15 day of April, 1954.

/s/ WM. M. BYRNE,

United States District Judge [14]

[Endorsed]: Filed April 15, 1954.

[Title of District Court and Cause.]

STIPULATION AS TO ISSUE

It is hereby stipulated by the parties to this proceeding, through their respective counsel, that the issue presented by Claimant's Motion is as follows:

Is a chiropractor, who is licensed under the California Chiropractic Act, a practitioner licensed by law to use or direct the use of devices such as the six reconditioned ultrasonic therapeutic devices involved in this case, so as to satisfy the requirements of 21 C.F.R. §1.106(e), as amended, and exempt the devices from complying with 21 U.S.C. 352(f)(1)?

Dated: May 21, 1954.

LAUGHLIN E. WATERS,
United States Attorney

/s/ MAN F. DEUTZ,
Asst. U. S. Attorney, Chief of Civil
Division
Attorneys for Libelant

/s/ SPENCER E. VAN DYKE,

/s/ JACK HILDRETH,
Attorneys for Claimant

[16]

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by the parties to this proceeding, through their respective counsel, as follows:

(1) Pursuant to the Consent Decree of Condemnation entered herein on October 22, 1952, the 47 ultrasonic devices under seizure were released by the United States Marshal for this District to the custody of the Claimant to be brought into compliance with law under the supervision of the Department of Health, Education, and Welfare.

(2) Claimant arranged to have said 47 devices shipped to his place of business at St. Louis, Missouri, where six of the devices were reconditioned from a physical standpoint to the satisfaction of the Department. Reconditioning of the remaining 41 devices has been suspended until a final decision is reached regarding the legality of Claimant's proposed method of distribution of the six reconditioned devices.

(3) Appended as Exhibit A is a copy of the revised labeling which [17] Claimant has proposed for said six reconditioned devices and to which the Department has no objection, provided that the "Caution" legend required by 21 C.F.R. §1.106(d) (2)(i) appears on the label of each such device.

(4) Ultrasonic therapy based upon the use of said six reconditioned devices involves the application of high frequency sound waves in the treat-

ment of patients by producing rapidly alternating compressions and rarefactions within the tissues. When such therapy is applied to the surface of the body therapeutically, the sound waves penetrate the body and may affect tissues of the body located inches beneath the surface.

(5) Ultrasonic therapy cannot be employed safely and efficaciously by the layman in self-medication, but requires competent supervision in its administration. Adequate directions for unsupervised lay use cannot be written for ultrasonic devices, within the meaning of 21 U.S.C. 352(f)(1). Interstate distribution which would not violate the Federal Food, Drug, and Cosmetic Act must therefore comply with the regulations which exempt devices from bearing adequate directions for use in their labeling. [21 C.F.R. §1.106, as amended]. One provision of these regulations exempts a device which is shipped to "a practitioner licensed by law to * * * use or direct the use of the device." [21 C.F.R. §1.106(e)].

(6) Claimant desires to ship the six reconditioned devices to the owners thereof residing in California who are licensed as chiropractors under the California Chiropractic Act, and in whose possession said devices were seized at the outset of this proceeding. The Department of Health, Education, and Welfare has advised the Claimant that such distribution would not be in compliance with law since, in the judgment of the Department, California chiropractors are not practitioners licensed by law

to use or direct the use of ultrasonic devices, as [18] required by 21 C.F.R. §1.106(e).

Dated: May 21, 1954.

LAUGHLIN E. WATERS,
United States Attorney
/s/ MAX F. DEUTZ,
Asst. U. S. Attorney, Chief of Civil
Division,
Attorneys for Libelant
/s/ SPENCER E. VAN DYKE,
/s/ JACK HILDRETH,
Attorneys for Claimant [19]

EXHIBIT A

Directions for Use of the Schlessing Ultrasoniseur in Ultrasonic Therapy

Introduction

The Schlessing Ultrasoniseur is an electrical instrument that transmits inaudible sound waves into the body. This transmission is accomplished by means of a special transducer head containing a quartz crystal. This device is used in applying ultra high frequency sound waves to the body. This vibratory property of certain crystals such as quartz was observed in 1917 by the French Physicist Langevin and is called the "piezo-electric effect".

Although Ultrasonic Therapy has been practiced in Europe for years, the domestic application of ultrasonics in physical medicine is relatively new. The Schlessing Ultrasoniseur combines the latest

advances in mechanical design with the newer knowledge of ultrasonic therapy to bring you an instrument calibrated and regulated to deliver 0.5 watt of energy per square centimeter of transducer head. Animal experimentation¹ has shown that when the Schlessing Ultrasoniseur is used according to directions, a moderate amount of energy is inducted into the tissue and bony structures but no observable damage results therefrom as determined by micropathological examination of various tissues and bones. However, it is of the utmost importance that treatments be given by a doctor thoroughly familiar with the potentialities of the apparatus inasmuch as there is always the possibility of tissue damage from the reflective qualities of ultrasound by causing localized over-heating of bone and muscle when the energy rays are concentrated too long in one place.

Ultrasound has therapeutic value partially because of its selective heating effect. As a result, a promising new instrument is available to the practitioner in the field of physical medicine.

Advantages of the Ultrasoniseur

Ultrasonic Therapy is so new in this country that its possibilities are just beginning to be investigated. An ultrasonic generator has advantages that

¹ Younger, F. M. The Effect of Multiple Treatments on New Zealand White Rabbits with the Schlessing Ultrasoniseur, unpublished report. Scientific Associates, Inc., St. Louis, Mo., January (1953).

no other instrument presently available to the physician possesses such as:

1. Efficient transfer of energy.²
 2. Good beaming and good depth of penetration of sound waves.²
 3. Energy absorbed to a greater extent in muscle than in fat.²
 4. Fair dosage determination.²
 5. Selective heating at the tissue-bone interfaces.²
- (6) The relative safety of a low (0.5 watt per square centimeter) output. [21]

Indications

Ultrasonic generators with outputs of 2.5—3.5 watts of energy per square centimeter have proven useful as a therapeutic adjunct in the treatment of osteoarthritis and bursitis.³ The Ultrasoniseur with its lower energy output of 0.5 watt per square centimeter may also be employed as an experimental procedure in the treatment of osteoarthritis and bursitis, Aldes, et al.,⁴ recently report that in a clinical study of 233 patients suffering with chronic

² Schwan, H. P., Carstensen, E. L. Advantages and Limitations of Ultrasonics in Medicine, J.A. M.A., May 10, 1952, Vol. 149, No. 2.

³ Newman, M. K., and Murphy, A. J. Application of Ultrasonics in Chronic Rheumatic Diseases. The Journal of the Michigan State Medical Society, Sept. 1952, Vol. 51, No. 9.

⁴ Aldes, J. H., and Jadeson, W. J. Ultrasound Therapy in Arthritis, Annals Western Medicine and Surgery, 6, 545-550, 1952.

hypertrophic arthritis of the cervical or lumbar spine, 103 or 44% seemed to be permanently improved, 63 or 27% were somewhat benefitted and no patient was harmed; 64 patients apparently failed to be benefitted by the treatment.

Clinical work to date with the low energy output Schlessing Ultrasoniseur has shown encouraging results in the treatment of bursitis. The instrument is recommended for use as a therapeutic adjunct in the treatment of the above named conditions.

Operating Instructions

After attaching the power plug to a 110 volt A.C. wall socket and making sure the transducer coaxial cable is properly connected to the receptacle on the front of the generator, turn the time switch to the desired length of treatment which, should not exceed 6 minutes. The red light on instrument will then go on, indicating it is being charged.

After approximately 10-15 seconds the meter will indicate a reading. Thereupon advance the Output control to a point where the meter needle is in the tune range as marked on the meter. Then adjust the Tuning control for a minimum dip in the meter reading. When the needle is at a minimum do not turn the tuning control any further.

Now that the instrument is in tune, advance the Output control to the desired output. The output meter is calibrated in watts per square centimeter (W/cm^2). The transducer crystal is 8 square centimeters in area. When the output meter reads $.5 \text{ W}/\text{cm}^2$ the power output of the transducer is then $.5 \times 8$, = total of 4 watts induction.

Caution

Do not attempt to advance the Output control above point where meter reads .5 w/cm². For check purposes, a simple physical test should precede treatment. Out of an eye dropper place 1 or 2 drops of water on the transducer head and if it is emitting sound energy the water will bubble (appear to boil) and disperse.

Method of Treatment

Before turning on the machine, prepare your patient for treatment. The area to be treated should be well defined and thoroughly covered with heavy mineral oil or lanolin prior to treatment. When this is done and not until then, turn on your instrument. [22]

After the water test has been made, apply transducer head flat against the skin and rotate slowly in circles large enough to cover entire surface under treatment at about 10 to 30 circles per minute, according to the size of the affected area. Total length of treatment not to exceed 6 minutes. Any air space between the transducer head and the skin destroys the effectiveness of the instrument by preventing transfer of energy to the patient.

As an added precaution, after several seconds of treatment always ask patient whether any sensation is felt. If more than gentle warmth is reported reduce energy output below 0.5 w/cm² until patient reports no discomfort or tingling sensation. This procedure may be necessary for the first two or

three treatments in cases where severe pain is present before initial treatment.

The number of treatments necessary to alleviate a given condition will depend on the mutual observations of the physician and the patient. Exposure time should be limited to not more than six minutes a treatment for a maximum of twelve treatments given once daily. However, if patient is available, a morning and evening treatment of 3-4 minutes each can be given.

Very important. Never hold transducer head still while in contact with the skin, but keep in constant motion as outlined above. It is imperative that the physician give his undivided attention to use of the instrument during treatment. Although the energy output has been held nearly to a minimum, the sound waves emitted by the Ultrasoniseur are capable of causing damage if the instructions are not carried out as written.

Small localized areas that are difficult to get at, are best treated by placing a rubber sheath or condom, half distended with tepid water and well oiled, over the member and transducer head is then circulated slowly over the rubber sheath.

Ultrasonic waves travel with very little energy loss through water or oil but the impedance rate is very high through air. In Europe under water treatments are used where direct contact is not practical. Transducer head is then rotated around the area of treatment within apprx. 1 inch distance. No actual contact should be made. Length of treatment same as in contact. While the under water

treatment is efficient, the condom is preferable because it is faster, less messy and more positive.

Contraindications

Treatment should not be given directly over the cardiac region.

Children should not be treated.

Malignancies.

Treatment should not be given in the vicinity of the brain, particularly over the eyes, ears, forehead and pate.

Treatment should not be given over areas where the skin suffers from any sensory impairment. [23]

Treatment should not be given Directly over the spinal column.

Treatment should not be given over reproductive organs.

Tuberculosis.

Pregnancy.

Energy Output

The Schlessing Ultrasoniseur oscillates at a frequency of approximately 1. megacycle per second. The effective area of the head, which coincides with the crystal area, is 8 square centimeters. The sonic waves given off are continuous and the energy output averages 0.5 Watts per square centimeter. This is an average value since the energy input is 4 Watts. The sonic energy actually given off at the center of the head has a maximum value of approximately two times the average output of 0.5 Watts per square centimeter.

Caution

Do not attempt to calibrate or set your Schlessing Ultrasoniseur in variance with the above instructions. If for any reason it becomes inoperative, notify us immediately.

A. Schlessing & Company, Inc.

Copyrighted 7-24-53 A. S. & Co., Inc.

[24]

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

**MOTION TO COMPEL ADMINISTRATIVE
APPROVAL OF CLAIMANT'S PROPOSED
METHOD OF DISTRIBUTING DEVICES
UNDER SEIZURE**

Claimant now moves this Court to order the Department of Health, Education, and Welfare¹ to approve Claimant's proposed method of distribut-

¹The Consent Decree of Condemnation filed in this case on October 22, 1952, directed that the condemned devices be brought into compliance with law under the supervision of the Federal Security Administrator who was then the head of the Federal Security Agency. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953 and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare established to administer the functions formerly in the said Agency under the supervision and direction of the Secretary of that Department. (18 Fed. Reg. 2053).

ing those of the devices under seizure which have been reconditioned from a physical standpoint to the satisfaction of the Department, and Claimant asserts the following grounds for this motion:

(1) Six of the ultrasonic devices under seizure have been reconditioned from a physical standpoint to the satisfaction of said [25] Department, pursuant to the Consent Decree of Condemnation entered in this case. Labeling for these devices has been prepared by the Claimant, and the devices are now ready for distribution.

(2) Claimant has proposed to ship these reconditioned devices to chiropractors who reside in California and are licensed under the California Chiropractic Act. In Claimant's opinion, such chiropractors are licensed to use and direct the use of ultrasonic therapeutic devices in their professional practice. Shipment of the devices to these chiropractors would comply with the regulations (21 C.F.R. 1.106(e)) which exempt devices from meeting the requirements of 21 U.S.C. 352(f)(1). Such shipments would therefore be in "compliance with law" as specified in paragraph (1) of the Consent Decree of Condemnation.

(3) Said Department has refused to approve Claimant's proposed method of distribution, basing its refusal upon an erroneous interpretation of the scope of a license granted under the California Chiropractic Act. The Department's conclusion that a chiropractor licensed in California, is not authorized to use or direct the use of ultrasonic therapeutic devices such as those six devices that are in

question here, is a mistaken one, as the said devices are used in physiotherapy which is a part of the practice of Chiropractic under the California Chiropractic Act.

Dated: This 21st day of May, 1954.

SPENCER E. VAN DYKE and
JACK E. HILDRETH,

/s/ By JACK E. HILDRETH,
Attorneys for Claimant [26]

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF DR. LEE H. NORCROSS, D.C.

State of California,
County of Los Angeles—ss.

Dr. Lee H. Norcross, D.C., being first duly sworn, deposes and says:

That affiant enrolled as a student in the Los Angeles College of Chiropractic in May of 1922 after investigating various schools of chiropractic, course of instruction, teaching methods, and reputation of the schools and colleges of which was included the Eclectic College, Ratledge System of Chiropractic Schools, the National College of Chiropractic of Chicago, Illinois, and the Los Angeles College of Chiropractic.

That affiant chose the Los Angeles College of

Chiropractic because after investigating the other schools above mentioned, it was his desire to become a general practitioner of the healing arts as taught in the Los Angeles College of Chiropractic. Further, after investigating all of the other colleges of chiropractic, he found that the Los Angeles College of Chiropractic taught the subjects that he [27] felt would fit him to become a general practitioner.

The course of instruction in the Los Angeles College of Chiropractic taken by affiant covered a 4,000-hour course. Affiant has examined a copy of the list of instruction given as set forth in Exhibit "B" of the affidavit of Dr. Harold A. Houde, D.C., and herein states that the same instruction was offered and taken in part for which affiant received the degree of Doctor of Chiropractic.

On attendance, affiant received instruction on the subjects and hours as listed in the transcript of his record which is marked Exhibit "A" and attached hereto. In addition thereto, affiant received the degree of Doctor of Naturopathy (N.D.) by diploma dated May, 1924, and subsequently, the degree of Philosopher of Chiropractic (PH C.).

The course of instruction taken and subsequently used by affiant in his practice was methods embodied in physiotherapy including electro, hydro, and mechanical therapies, together with general massage.

That the term chiropractic as known and used at the time of passage of the Chiropractic Act of 1922

was not limited to the definition as advocated by B. J. Palmer but had advanced to include spinal manipulation together with other drugless and physiological therapy including physiotherapy.

That among other textbooks studied by affiant while attending the Los Angeles College of Chiropractic was the "Principles and Practice of Spinal Adjustment" by Arthur L. Forster published at Chicago, the National School of Chiropractic, copyright 1915.

That affiant was a member of the State Board of Chiropractic Examiners from approximately 1930 to 1933; that the examinations prescribed by said Board to be taken by applicants for licenses to practice chiropractic have at all times included questions both on theory and the practice of physiotherapy, including electro, mechanical, hydro, manipulation, etc. [28]

Of the various schools of chiropractic, the definition of chiropractic as adopted by the California Act of 1922 and as taught in the majority of California colleges of chiropractic was the broad Forster definition of chiropractic practice and not a limited technique of spinal adjustment.

That affiant was present in California and advocated and worked for the passage of the Chiropractic Act of 1922; that affiant procured from the Secretary of State, Frank M. Jordan, a copy of the sample ballot including the explanation of the Act and arguments for and against the passage of said

Act, a photostatic copy of which is attached hereto and marked Exhibit "B".

/s/ LEE H. NORCROSS, D.C., Affiant
Doctor of Chiropractic

Subscribed and sworn to before me this 19th day of November, 1954.

[Seal] /s/ JACK E. HILDRETH,
Notary Public in and for said
County and State [29]

[Endorsed]: Filed November 22, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF DR. HAROLD A. HOUDE, D.C.

State of California,
County of Los Angeles—ss.

Dr. Harold A. Houde, D.C., being first duly sworn, deposes and says:

That affiant was continuously a student at the Los Angeles College of Chiropractic from October of 1920 up to and including September of 1922; that the course of instruction received by affiant is contained in the photostatic copy of the transcript of his record which is attached hereto marked Exhibit "A"; a photostatic copy of the course of instruction covering 4,000 hours as was offered to students of the Los Angeles College of Chiropractic from October, 1920 up to and including January,

1924 is attached hereto and marked Exhibit "B".

The course of instruction taken and subsequently used by affiant in his practice was methods embodied in physiotherapy including electro, hydro, and mechanical therapies, together with general massage.

That the term chiropractic as known and used at the time of [39] passage of the Chiropractic Act of 1922 was not limited to the definition as advocated by B. J. Palmer but had advanced to include spinal manipulation together with other drugless and physiological therapy including physiotherapy.

That among other textbooks studied by affiant while attending the Los Angeles College of Chiropractic was the "Principles and Practice of Spinal Adjustment" by Arthur L. Forster published at Chicago, the National School of Chiropractic, copyright 1915.

Of the various schools of chiropractic, the definition of chiropractic as adopted by the California Act of 1922 and as taught in the majority of California colleges of chiropractic was the broad Forster definition of chiropractic practice and not a limited technique of spinal adjustment. That in 1922 the special brand of chiropractic that was taught by the Palmer school was not uniformly adopted by the schools and colleges teaching chiropractic in the State of California and elsewhere. A photostatic copy of the Los Angeles College of Chiropractic brochure of 1921-1922 outlining the scope, curriculum and general information is marked Exhibit "C" and attached hereto.

That the Palmer theory of chiropractic was limited to a "chiropractic thrust" and did not even embody the manipulation as taught in most schools and colleges.

At the time of passage of the Chiropractic Act there were several theories or schools as to what was the manner to practice chiropractic. That affiant chose to attend the Los Angeles College of Chiropractic because it offered education in the broad field of chiropractic.

/s/ HAROLD A. HOUDE, D.C., Affiant,
Doctor of Chiropractic

Subscribed and sworn to before me this 19th day of November, 1954.

[Seal] /s/ JACK E. HILDRETH,
Notary Public in and for said
County and State [40]

[Endorsed]: Filed November 22, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF
DR. CARL ERIC HOTCHKISS, D.C.

State of California,
County of Los Angeles—ss.

Dr. Carl Eric Hotchkiss, D.C., being first duly sworn, deposes and says:

That affiant enrolled in the Eclectic College of Chiropractic June 1, 1920 and graduated June 1,

1921; that he continued in post-graduate attendance until December 20, 1921; a true transcript of his curriculum, including the hours and subjects taken, is contained in the transcript of record, marked Exhibit "A" and attached hereto.

That among the subjects taught at the Eclectic College of Chiropractic from June, 1920 to and including the effective date of the Chiropractic Act, December 21, 1922, were:

Chiropractic Theory and Technique, Psycho-Analysis.

Osteopathic Theory and Technology, Obstetrics, Gynecology, Minor Surgery.

Diagnosis, Dermatology, Genito-Urinary Diseases. Histology, Bacteriology, Hygiene. [88]

Nose and Throat.

Physiology, Pathology.

Psychology.

Anatomy.

Massage, Hydro-Therapy.

Dietetics.

Mechano-Therapy.

Roentgenology, Electro-Therapy, Chemistry.

Optometry and Diseases of the Eye.

That upon becoming interested in pursuing the chiropractic profession, affiant visited various schools of chiropractic, including the Los Angeles College of Chiropractic, Ratledge System of Chiropractic Schools, and Eclectic College of Chiropractic; that a photostatic copy of the brochure of the Eclectic College of Chiropractic which was given to affiant on his original interview in 1920 is attached

hereto and marked Exhibit "B"; that affiant chose the Eclectic College of Chiropractic because its curriculum offered an opportunity for affiant to obtain a broad scope of training in the field of chiropractic and allied subjects and was not limited to the B. J. Palmer concept of curing all ills and diseases by spinal manipulation only.

That upon graduating from the Eclectic College of Chiropractic on June 1, 1921, affiant received the degree of Doctor of Chiropractic (D.C.); that subsequently in 1921, affiant received the degree of Philosopher of Chiropractic (Ph.C.) and the degree of Doctor of Naturopathy (N.D.).

That among other textbooks studied by affiant while attending the Eclectic College of Chiropractic was the "Principles and Practice of Spinal Adjustment" by Arthur L. Forster published at Chicago, the National School of Chiropractic, copyright 1915.

That the theory and definition of chiropractic in 1922 had changed from B. J. Palmer's theory of curing all disease by spinal manipulation to one of the use of spinal adjustment together with drugless and physiological therapy such as attention to diet, hydrotherapy, massage, etc.

Of the various schools of chiropractic, the definition of [89] chiropractic as adopted by the California Act of 1922 and as taught in the majority of California colleges of chiropractic was the broad Forster definition of chiropractic practice and not a limited technique of spinal adjustment.

That at the time the 1922 Chiropractic Act was passed by initiative the great majority of chiro-

practicers then practicing without a license or under Drugless Practitioners' licenses which were issued pursuant to the Medical Practice Act, had adopted and were practicing chiropractic in the broad sense of the word including the use of an adjunctive therapy which included what we now know as physiotherapy.

/s/ CARL ERIC HOTCHKISS, Affiant,
Doctor of Chiropractic

Subscribed and sworn to before me this 19th day of November, 1954.

[Seal] /s/ JACK E. HILDRETH,
Notary Public in and for said
County and State [90]

[Endorsed]: Filed November 22, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF A. SCHLESSING

A. Schlessing, being duly sworn upon his oath, states that he is President of A. Schlessing & Co., a corporation, and that upon the institution of this action he immediately went to California and the Company undertook voluntarily the defense of this action on behalf of the various owners of the machines under seizure; that counsel were employed by the company in Los Angeles, in addition to counsel in St. Louis. As a result of negotiations with government counsel, a consent decree was entered into as

reflected in the record of this proceeding. Thereafter, A. Schlessing & Co. employed the firm of Scientific Associates, Inc., a St. Louis concern, for the purpose of conducting experiments to demonstrate the safety and therapeutic value of the machine. Extensive negotiations were carried on with the Food and Drug Administration, Washington, D. C., and affiant made one trip personally to Washington for this purpose and affiant's counsel made two trips to Washington, accompanied by a representative of Scientific Associates. Reports of the work performed by Scientific Associates were submitted to Washington demonstrating the safety of the device. The mechanics of the device were reviewed with representatives of the Food & Drug Administration and agreement reached as to installation of additional safety controls on the devices so as to [108] better control the output of energy and length of treatment with the result that the mechanical design and operation of the device was approved. Machines were placed in various hospitals and clinics in St. Louis, Chicago and East St. Louis, Illinois, and with physicians in St. Louis and Chicago, for the purpose of determining the therapeutic value of the machine. As a result of these efforts a report was prepared by Dr. A. H. Diehr, Chief of the Service Department of Orthopedics and Director of the Department of Rehabilitation, Missouri Baptist Hospital, St. Louis, Roland M. Klemme, M.D., St. Louis, Missouri, and F. M. Younger, B.S., St. Louis, Missouri, on the indications for the use of the Schlessing Ultrasoniseur,

which report was submitted to Washington. The directions for the use of the Schlessing Ultrasoniseur were revised and a number of drafts prepared and submitted to Washington until finally, in July of 1953, a draft was approved by Washington and the Food and Drug Administration authorized distribution of the reworked and relabeled devices to practitioners licensed by law to use ultrasonic devices. At this point A. Schlessing & Co., which had voluntarily ceased distribution of its devices upon the institution of the condemnation action, resumed the distribution of the devices, having been totally out of business for almost a year. At this time also the Company proposed to return the devices under seizure to their respective owners but was confronted with the proposition that the Food and Drug Administration would not permit the return of such machines as were owned by chiropractors on the ground that chiropractors in California were not authorized to use such devices. Counsel for the Company argued and briefed this point with the Food and Drug Administration but were unable to reach any agreement as to the law, so that this question is now being presented to the Court for decision. The Company has been seriously handicapped in its business by reason of the extended proceedings, it being now almost two full years since the institution of the action, and the Company has been able to resume operations only to a limited extent since it felt that it could not, in good conscience, resume full scale operations as long as the California machines remained under

seizure. At the present time the devices under seizure are in St. Louis for the purpose of installation [109] of safety controls. These modifications have been performed on some of the devices and approved by the local office of the Food and Drug Administration, but the work has been suspended pending the decision as to whether or not the machines can be returned to their owners since there would be no point in expending further moneys on the machines if they must be turned back to the marshal for destruction.

/s/ A. SCHLESSING

Subscribed and Sworn to before me this 15th day
of July, 1954.

[Seal] /s/ MARIE G. SHAW,
Notary Public [110]

[Endorsed]: Filed November 22, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on for hearing on December 22, 1954, on a Motion by Claimant A. Schlessing to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure, the Libelant United States of America, being represented by Laughlin E. Waters, United States Attorney, Max

F. Deutz, Assistant United States Attorney, and Arthur A. Dickerman, Attorney, Department of Health, Education and Welfare, and Claimant A. Schlessing being represented by Spencer E. Van Dyke and Jack E. Hildreth, and the Court having granted a Motion by the National Chiropractic Association, by C. P. Von Herzen and S. L. Laidig, Esquires, to appear Amicus Curiae, and the Court having [111] accepted Stipulations of Fact, and having received arguments both written and oral, and the Court being fully satisfied in the premises, and it appearing to the Court that:

(1) On September 5, 1952, the United States, libellant herein, filed a Libel of Information in this Court under the Federal Food, Drug, and Cosmetic Act seeking condemnation of 75 devices, more or less, designated as "The Schlessing Ultrasoniseur" which had been shipped in interstate commerce from St. Louis, Missouri, to various chiropractors practicing within the jurisdiction of this Court.

(2) The Libel alleged that these devices were misbranded in violation of 21 U.S.C. 352(a) because their labeling bore false and misleading therapeutic claims for many disease conditions ranging from abscesses to ulcers.

(3) The Libel alleged that these devices were further misbranded in violation of 21 U.S.C. 352 (a) because their labeling contained such false and misleading statements as "This Machine Is Absolutely Safe"; "No special skill, no involved instructions and no long experience is necessary to use the Schlessing Ultrasoniseur properly"; and "There are

no contraindications. No danger of deep burns, tissue damage or irritation. Equally important, there are no possible harmful effects to the person administering treatment."

(4) The Libel also alleged that the devices were misbranded in violation of 21 U.S.C. 352(f)(1) because their labeling failed to bear adequate directions for use.

(5) The Libel also alleged that the devices were adulterated in violation of 21 U.S.C. 351(c) because their strength differed from and their quality fell below that which they purported and were represented to possess, since their ability to produce total [112] sound output differed materially from the ability they were represented to possess, and the output meter did not accurately gauge the energy density output of the devices.

(6) On October 22, 1952, Mr. A. Schlessing of St. Louis, Missouri, intervened as claimant in this proceeding. He is the president of A. Schlessing and Company, Inc., which manufactured these devices. He is also the agent of the owners and consignees of the devices.

(7) Also on October 22, 1952, a Consent Decree of Condemnation was entered in this case. By its terms, the devices under seizure were adjudged adulterated and misbranded as alleged in the Libel and were condemned under 21 U.S.C. 334(a). In addition, pursuant to 21 U.S.C. 334(d), claimant was accorded the privilege of attempting to bring the devices into compliance with law under supervision of a duly authorized representative of the Federal

Security Administrator, hereinafter called the Secretary.¹

(8) One provision in the Consent Decree declares in substance that the claimant shall not distribute the devices until he obtains a written release from a representative of the Secretary, and there is the further proviso that

“Claimant shall make no distribution of said articles or any part of them except in strict accord with such terms and conditions as may be included in said written release.” [113]

(9) Claimant thereupon arranged to ship the 47 devices actually seized by the United States Marshal back to his place of business at St. Louis, Missouri, where six of them were reconditioned from a physical standpoint to the satisfaction of the Department of Health, Education, and Welfare. Reconditioning of the remaining 41 devices has been suspended until a final decision is reached regarding the legality of claimant's proposed method of distribution of the six reconditioned devices.

(10) Claimant now wishes to ship the six reconditioned devices back to the licensed California

¹The Federal Security Administrator was then the head of the Federal Security Agency which was charged with the administration of the Federal Food, Drug, and Cosmetic Act. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953 and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare was established to administer the functions formerly in that Agency, under the supervision and direction of the Secretary of that Department. [18 Fed. Reg. 2053].

chiropractors in whose possession these devices were seized at the outset of this proceeding. The Department has refused to release the devices for such distribution.

(11) It is agreed by the parties that these ultrasonic devices produce high frequency sound waves which have therapeutic value as an adjunct in the treatment of osteoarthritis and bursitis. It is also agreed—

“Ultrasonic therapy cannot be employed safely and efficaciously by the layman in self-medication, but requires competent supervision in its administration. Adequate directions for unsupervised lay use cannot be written for ultrasonic devices, within the meaning of 21 U.S.C. 352(f)(1). Interstate distribution which would not violate the Federal Food, Drug, and Cosmetic Act must therefore comply with the regulations which exempt devices from bearing adequate directions for use in their labeling. [21 C.F.R. §1.106, as amended]. One provision of these regulations exempts a device which is shipped to ‘a practitioner licensed by law to * * * use or direct the use of the device.’ [21 C.F.R. §1.106(e)].” [114]

(12) The Department’s refusal to release the re-conditioned devices for distribution in the manner proposed by the claimant is based upon its view that California chiropractors are not licensed by law to use or direct the use of ultrasonic devices. Consequently, shipment of the devices to the chiropractors would not meet the conditions of the ex-

emption regulations.² Since the devices would not bear adequate directions for use in their labeling as required by 21 U.S.C. 352(f)(1), and would not be exempt from that requirement, they would be misbranded.

(13) On May 24, 1954, claimant filed a Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices under Seizure. The Motion asserts that the Department's refusal to approve is based upon an erroneous interpretation of the scope of a license granted under the California Chiropractic Act.

Now Therefore, the Court makes the following:

Findings of Fact

I.

Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments. [115]

II.

Ultrasonic therapy is taught in one chiropractic college in California, but it is not a part of the practice of chiropractic.

III.

A subject does not become a part of the practice of chiropractic merely because it is taught in a

² Paragraph (7) of the Consent Decree of Condemnation declares: "The Claimant shall not sell or dispose of said articles or any part thereof in a manner contrary to the provisions of the Federal Food, Drug, and Cosmetic Act, or the laws of any State * * * in which they are sold or disposed of."

chiropractic college. Many subjects are taught in Chiropractic colleges which are not part of the practice of chiropractic.

IV.

Ultrasonic therapy is not a necessary mechanical measure incident to the care of the body in the practice of chiropractic.

V.

Ultrasonic therapy is a part of the practice of medicine.

VI.

A chiropractor licensed under the laws of California is not authorized to use or direct the use of the ultrasonic devices under seizure in this case.

From the foregoing Findings of Fact the Court makes the following

Conclusions of Law

I.

Devices which are condemned for violation of the Federal Food, Drug, and Cosmetic Act may be salvaged by the claimant pursuant to 21 U.S.C. 334 (d), not as a matter of right but within the discretion of the Court. Salvaging, where authorized by the Court, must be carried out under the supervision of an officer or employee duly designated by the Secretary of Health, Education, and Welfare.

II.

Salvaging of condemned devices cannot be authorized under 21 U.S.C. 334(d) in a manner that will violate the Federal Food, [116] Drug, and

Cosmetic Act or the laws of the State in which they are sold.

III.

Under 21 U.S.C. 352(f)(1), a device is misbranded if its labeling does not bear adequate directions for use.

IV.

Where a device cannot be employed safely and efficaciously by the layman in self-medication but requires competent supervision in its administration, "adequate directions for use" cannot be written within the meaning of 21 U.S.C. 352(f)(1).

V.

A device may be exempt from the requirement that its labeling bear "adequate directions for use" if it complies with the exemption regulations promulgated by the Secretary of Health, Education, and Welfare under 21 U.S.C. 352(f).

VI.

A device which is shipped to "a practitioner licensed by law to * * * use or direct the use of the device" may be exempt from the requirement that its labeling bear "adequate directions for use." [21 C.F.R. §1.106(e)].

VII.

A chiropractor licensed under the California Chiropractic Act is authorized (a) to practice chiropractic as taught in chiropractic schools or colleges and (b) to use all necessary mechanical, and hygienic and sanitary measures incident to the

care of the body, but not to practice medicine, surgery, osteopathy, dentistry, or optometry, and not to use any drug or medicine included in *materia medica*. [117]

VIII.

The term "necessary mechanical * * * measures incident to the care of the body" as used in Section 7 of the California Chiropractic Act further delineates the scope of a licentiate's authority to assure his right to use only such measures as are necessary and incidental to the care of the body in the practice of chiropractic, such as a chiropractic table.

IX.

Ultrasonic therapy is a part of the practice of medicine; it is not a part of the practice of chiropractic nor is it a "necessary mechanical * * * measure incident to the care of the body" as that term is used in Section 7 of the California Chiropractic Act.

X.

The ultrasonic devices under seizure in this case do not bear adequate directions for use and are not exempt from that requirement.

XI.

A chiropractor licensed under the California Chiropractic Act is not "a practitioner licensed by law to use or direct the use of" the ultrasonic devices under seizure.

XII.

Claimant's Motion should be denied with leave to the claimant to submit to the Department of Health,

Education, and Welfare any [118] other proposal for distribution that would place these devices in the hands of practitioners who are licensed by law to use them.

Dated: February 9, 1955.

/s/ WM. M. BYRNE,

United States District Judge [119]

[Endorsed]: Filed February 10, 1955.

In the United States District Court for the Southern District of California, Central Division

Civil No. 14482-WB

UNITED STATES OF AMERICA,

Libelant,

vs.

75 Articles of device, more or less, designated as
"The Schlessing Ultrasoniseur," together with
their labeling, Respondents.

ORDER

The above entitled matter having come on for hearing on December 22, 1954, on a Motion by Claimant A. Schlessing to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure, the Libelant United States of America being represented by Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, and Arthur A. Dickerman, Attorney, Department of

Health, Education, and Welfare, and Claimant A. Schlessing being represented by Spencer E. Van Dyke and Jack E. Hildreth, and the Court having granted a Motion by the National Chiropractic Association, by C. P. Von Herzen and S. L. Laidig, Esquires, to appear Amicus Curiae, and the Court having [120] accepted Stipulations of Fact, and having received arguments both written and oral, and the Court being fully satisfied in the premises, and the Court having made and filed its Findings of Fact and Conclusions of Law.

Now Therefore, It Is Hereby Ordered that the Motion of Claimant to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure is denied, with leave to the claimant to submit to the Department of Health, Education, and Welfare any other proposal for distribution that would place these devices in the hands of practitioners who are licensed by law to use them, providing such proposal is submitted to the Department of Health, Education, and Welfare, or its field representatives, within a period of 90 days from the entry of this Order.

Dated: February 9, 1955.

/s/ WM. M. BYRNE,

United States District Judge [121]

Affidavit of Service by Mail attached. [122]

[Endorsed]: Judgment entered and filed February 10, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that A. Schlessing, the Claimant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order denying claimant's motion to compel administrative approval of Claimant's Proposed Method of Distributing Devices under Seizure, entered in this action on February 10, 1955.

SPENCER E. VAN DYKE and
JACK E. HILDRETH,

/s/ By JACK E. HILDRETH [123]

Affidavit of Service by Mail attached. [124]

[Endorsed]: Filed April 7, 1955.

In the United States District Court for the Southern District of California, Central Division

Civil No. 14482-WB

UNITED STATES OF AMERICA,

Libelant,

vs.

75 Articles of Device, Etc., Respondents,

FINAL DECREE

This Court, having heretofore issued a Consent Decree of Condemnation on October 22, 1952, wherein said Consent Decree of Condemnation provided that the articles of device under seizure were

adulterated and misbranded as alleged in the Libel of Information in violation of 21 U.S.C. 351(c), 352(a), and 352(f)(1); and having ordered said devices condemned pursuant to 21 U.S.C. 334(a); and having further ordered that the United States recover from the claimant court costs and fees, pursuant to 21 U.S.C. 334(e); and having further ordered that the United States Marshal deliver all of the literature accompanying said devices to the representative of the United States Food and Drug Administration; and having further ordered that the United States Marshal release the said devices (without the said literature) to the custody of the claimant for the purpose of attempting to bring the said articles into compliance with the law, under the supervision of the United States Food and Drug Administration; and the Court having further entered its order on February 10, 1955, denying the claimant's motion which, if granted, would have permitted distribution of the devices to chiropractors in California, [127] granting, however, to the claimant a period of ninety days within which to submit to the Department of Health, Education, and Welfare any other proposal for distribution; and said ninety days having elapsed, and the court having been advised by the parties that the claimant has made no additional proposal for distribution and chooses to stand upon the proposal which was rejected by the aforesaid order;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

(1) That the claimant return said devices at his

own expense to the United States Marshal for this District, under the supervision of the St. Louis District of the Food and Drug Administration, Department of Health, Education, and Welfare, Room 1007 New Federal Building, 1114 Market Street, St. Louis 1, Missouri; and

(2) That the United States Marshal shall offer said devices for sale in such manner and under such conditions as shall be approved by the Los Angeles District of the Food and Drug Administration, Department of Health, Education and Welfare; and

(3) That Venditioni Exponas issue therefor, and that said United States Marshal make his return thereof into Court, after deducting all expenses incident to said sale.

Dated: May 17, 1955.

/s/ WM. M. BYRNE,

United States District Judge

Presented by:

MAX F. DEUTZ, Asst. U. S. Attorney,
Attorney for Libelant.

Approved as to Form:

/s/ JACK E. HILDRETH,
Attorney for Claimant. [128]

[Endorsed]: Filed May 17, 1955.

[Endorsed]: Judgment entered May 18, 1955.

[Title of District Court and Cause.]

ORDER STAYING FINAL DECREE, REDUCING BOND, AND PERMITTING REMOVAL OF DEVICES

The claimant having informed the Court that he intends to appeal from the Final Decree, heretofore ordered in this case on May 17, 1955; and the parties having agreed to the entry of an Order Staying said Final Decree;

Now, therefore, It Is Hereby Ordered:

(1) That the Final Decree be stayed during the pendency of the appeal in this proceeding;

(2) That the \$30,000.00 performance bond which was posted by the claimant, pursuant to the Consent Decree of Condemnation filed in this cause on October 22, 1952, may be reduced to \$5,000.00, which bond shall incorporate the same terms and conditions as the \$30,000.00 bond as aforesaid:

(3) That upon the claimant's filing of a good and sufficient \$5,000.00 performance bond with surety, as aforesaid, the \$30,000.00 bond already on file shall be exonerated; and

(4) That the claimant may, with the prior written approval [129] of the St. Louis District, Food and Drug Administration, Department of Health, Education and Welfare, 1114 Market Street, St. Louis 1, Missouri, remove the devices under seizure in this case from his place of business to a warehouse.

Dated: May 17, 1955.

/s/ WM. M. BYRNE,
United States District Judge

We hereby agree to the entry of the foregoing
Order:

/s/ JACK E. HILDRETH,
Attorney for Claimant

/s/ MAX F. DEUTZ,
Attorney for Libelant [130]

[Endorsed]: Filed May 17, 1955.

[Endorsed]: Judgment Docketed and Entered
May 18, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that A. Schlessing, the
Claimant herein, hereby appeals to the Court of
Appeals for the Ninth Circuit from the Final De-
cree entered in this action on May 17, 1955.

SPENCER E. VAN DYKE and
JACK E. HILDRETH,

/s/ By JACK E. HILDRETH [131]

Affidavit of Service by Mail attached. [132]

[Endorsed]: Filed May 27, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 133, inclusive, contain the original

Libel;

Claim of A. Schlessing;

Consent Decree of Condemnation;

Stipulation and Order Scheduling Further Court Proceedings;

Stipulation as to Issue;

Stipulation of Facts;

Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure;

Affidavit of Dr. Lee H. Norcross, D.C.;

Affidavit of Dr. Harold A. Houde, D.C.;

Affidavit of Dr. Carl Eric Hotchkiss, D.C.;

Affidavit of A. Schlessing;

Findings of Fact and Conclusions of Law;

Order;

Notice of Appeal filed April 27, 1955;

Stipulation and Order Extending Time for Filing Record on Appeal and Docketing Appeal;

Final Decree;

Order Staying Final Decree, Reducing Bond, and Permitting Removal of Devices;

Notice of Appeal filed May 27, 1955;

Stipulation as to Record, which, together with a full, true and correct copy of the Reporter's Tran-

script of Proceedings had on November 22 and December 22, 1954; Respondent's exhibit "B"; Respondent's exhibit "A"; all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 29th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
 Clerk
/s/ By CHARLES E. JONES,
 Deputy

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Monday, Nov. 22, 1954

Honorable Wm. M. Byrne, Judge presiding.

* * * * *

Mr. Hildreth: If the Court please:

We are before this court again, pursuant to the Consent Decree of Condemnation wherein 47 devices in this matter were condemned and on certain conditions were returned to the manufacturer to bring them up to standards and correct labeling according to the Federal Food and Drug Acts.

We now propose to distribute these devices and

we feel that our proposal is in accordance with that Act.

Through stipulations and various discussions with the Federal authorities, Mr. Dickerman and Mr. Deutz, we have cut this issue down, we feel, to the most simplest possible terms, one, that is, if the chiropractors are entitled to use these devices, because of their licenses to practice chiropractic, in the state of California, then, the proposed distribution we feel is correct.

We have examined the authorities and we do now offer some new arguments, that we feel have not been presented to this court or to any other California court.

Our theory is different in this respect: We feel that these machines are therapeutic devices. As a matter of fact, I think the stipulation will go somewhat to that end.

These machines are machines that are essentially to put out massage to the tissue of the human body; that they are calorated to put out one-half of a watt per square centimeter of the head, of the induction head and in that regard are not harmful.

In the Stipulation and in the labeling proposed by the Claimant at this time, there is appended Exhibit A. Exhibit A is our proposed labeling in some four pages and you will note in the Bibliography on page 4 there is reference to the effect of multiple treatments of New Zealand white rabbits, a study made by a group in St. Louis. We have a copy of this study, a laboratory analysis, and we

would like to lodge it at this time with the court and have that marked as an exhibit.

The Court: Pardon me. Is that offered for identification?

Mr. Hildreth: Yes, for identification, at this time.

The Clerk: It will be Respondents' Exhibit A, for identification.

(Said 4-page document was marked by the Clerk as Respondents' Exhibit A, for identification.)

Mr. Hildreth: Ultrasonic therapy is not something that is entirely new. It is a rather recent development in the field of the whole practice.

The device that we have manufactured is designed mainly for the use of the practicing physiotherapist, chiropractor, osteopath, physician, in conjunction with other forms of treatment of these diseases. It puts out, as I say, half a watt per square foot of the transducer head.

According to the various physical and medical journals, in the treatments used by it the physicians and surgeons have all stated that this device has therapeutic value.

The physician normally uses an output of energy from 3 to 6 watts per square foot of the transducer head. The authority for that we have cited in our reply brief, the statement from the Second Annual Conference on Physical Medicine.

The reason this machine has been cut down to the one-half watt per square foot is to take out any possibility that is possible of course of any harm or danger in its application.

This machine is used and intended for use solely in the treatment of two diseases, bursitis and osteoarthritis, and it is strictly one of massage.

The question then turns on whether or not a chiropractor may use physiotherapeutic devices. We submit that he can.

In 1922 the field of chiropractic had only been some 18 years old.

Regarding the factual background of chiropractic, although it was originally developed or discovered perhaps by Dr. D. D. Palmer, who incidentally I believe was a medical doctor, he did not bring that science into being as we now know it, but he waited until his son, Dr. B. J. Palmer in 1903 put forth the theory that all diseases could be cured by the manipulation of the spine.

By 1915, many doctors, medical doctors, osteopaths and others interested in the field of chiropractic had expanded and developed the field of chiropractic so that it did not merely include the cure of all diseases by manipulation of the spine by hand but included additional therapy to be used with the spinal adjustment.

In 1922, at the time of the Act, there were several schools of chiropractic, two or three of which were located in Southern California. One was the Eclectic College of Chiropractic here. Another was the Los Angeles College of Chiropractic, and the third was the Ratledge System of Chiropractic Schools.

The Eclectic College and the Los Angeles College did not prescribe to the theory that all diseases

could be cured by manipulation of the spine. They felt that adjunct therapy was also necessary. As a matter of fact, in their textbooks, the Chiropractors were taught that there were two diseases that the spinal manipulation would not cure. One was mental illnesses and the other being an osteomyelitis type of disease.

We also offer for identification a textbook used, according to the affidavits on file, entitled *Principles and Practice of Spinal Adjustment*, by Arthur L. Forster, M.D., D.C., published in Chicago by The National School of Chiropractic, Copyright, 1915.

The Clerk: Exhibit B, for identification.

(Said book was marked by the Clerk as Respondents' Exhibit B for identification.)

* * * * *

December 22, 1954

Mr. Hildreth: If the Court please, at the conclusion of the hearing in the early part of this month, I was discussing the warranties of this machine very briefly.

As the Court will recall, the machine involved in this action is one of an ultrasonic vibrating type that is calibrated to put out one-half a watt of energy per square centimeter of the transducer head. This is a rather new type of therapy, developed primarily in Europe, but since 1937 some of the medical doctors, osteopaths and chiropractors have been in some ways experimenting with it.

They have now the American Institute of Ultrasonics in Medicine, and this is the "Scientific Pro-

ceedings of the Second Annual Conference of Ultrasonic Therapy," reprinted from the American Journal of Physical Medicine, Volume 33, No. 1, February, 1954. Dr. Karl Theo Dussik delivered a paper before that body, and at that time, on page 11 of the document I have described, he states:

"Of great importance is the knowledge of the maximum intensity which is tolerated without producing a damaging effect. This threshold is well established. For practical use, intensities of not more than 3 watts per square centimeter can be considered as safe, provided a technique is used in which the treating head is in continual movement. Pain is the best practical safeguard; if no immediate pain is produced during the actual application, no damaging effect need be expected, provided of course that the exposed area has a normal pain sensation. In case of interrupted energy application (pulsed sound) a higher intensity is safe."

It is therefore submitted by the moving party in this instance that this machine, being one that has been calibrated at a lower point, it is one of the physiotherapy machines, and it has therapeutic value.

I think that is the main distinction between the case on which the government relies so heavily, and heard at some length in this court, namely, the Halox case, and this case. In the Halox case this Court had a machine that had no therapeutic value. As a matter of fact, the Court had affidavits, and one of the affidavits was produced by the same doctor,—I think it was Houde or Norcross, or one

of them, that has also been produced in this case, stating that ultrasonic therapy has never been taught in the School of Chiropractic in the State of California.

So with this in mind, I think we should turn to the question of what the law allows a chiropractor to do in the State of California. The courts have held, from *People vs. Steele* on, that it limits the chiropractor to that which was taught in the schools of chiropractic in 1922. They further state the Court should take evidence to find out what was taught at that time.

In 1922, according to the affidavits of Drs. Norcross and Houde, the book used in the Eclectic College of Chiropractic was the "Principles and Practice of Spinal Adjustment" by Arthur L. Forster, this being Exhibit B, for identification, and if the Court will go through this, the Court will find that the treatment prescribed by Dr. Forster embodies the use of physiotherapy in nearly three-fourths of the matters therein set forth to be treated. As an example, rheumatics, in chronic articular rheumatism, the treatment, including some adjustment, includes:

"Baking of the joints or application of heat in various ways: hot air, electricity, or steam baths are very useful. The diet should be free from meat, and only fresh vegetables should be used."

Going on to rheumatoid arthritis the court would find that the treatment also includes the use of heat, baths, hot compresses, massage—a very im-

We submit that at this time of the doctors that are using this machine in accordance with their license, of the 47 machines—and I do not have an affidavit, but I have checked it—I have only to say to the Court that there are some 40 of them that are licensed M.D.s or naturopaths.

I think that if the Court, after reading the book, and which I will offer in evidence at this time, together with Exhibit 1, as showing and describing what the affidavits state,—

The Clerk: That is Exhibit A.

Mr. Hildreth: Is that A?

The Clerk: Yes.

Mr. Hildreth: —Exhibits A and B,—that if the Court follows the archaic definition of a chiropractic as merely the spinal adjustment, the manipulation of the spine with the hand, that the Oosterveen case is then left meaningless, and that the Evans vs. McGranaghan case is within that category, wherein they state the Court must find out just exactly what was taught.

I think further in the case of People vs. LaBarre the Court stated it was necessary to determine at that time what was taught in the school of chiropractic at this time.

If the Court will go through the affidavits, you will find that physiotherapy was taught throughout that era as a part of chiropractics. Another thing, that when the Act was amended in 1947 it increased the requirements to 4,000 hours from 2,400 hours, and you will note that the division wherein physiotherapy was actually spelled out is the division on

chiropractic, and that, therefore, the two have been associated together so closely in the minds of everyone that there be physiotherapy at that point in the requirements.

In *Hunt vs. State Board* I think that the Court made a very sage observation, that the healing arts are not a static science, that they must be able to advance, and if the narrow limited view is followed by the Court that a chiropractor is limited to the adjustment of the spine, with all due respect, I cannot see how any adjustment or any advancement can be made in the field of chiropractic.

I further feel, under the cases as they now stand, that the field of chiropractic has advanced to a point where the doctors have a much better education, that the stigma which was attached to them back in 1920 or 1922, when they were arrested and thrown in jail, has gone, and that their proper place in the healing arts, which is manipulation and adjustment and replacing of joints, and the physiotherapeutic devices which they need in that field should be allowed to them in the practice of their healing arts.

Thank you.

Mr. Deutz: Your Honor, I believe that the government in this case has briefed its position at length, so I do not feel that oral argument on our part is called for.

We feel that the libelant's reply brief in essence answers the argument given today. In fact, it was prepared after this argument was commenced at the last session of this Court in this matter, and unless

the Court has some particular inquiry as to the government's position, we intend to rely on the briefs as filed, and, particularly, on the interpretation of the scope of the practice of chiropractics, as set forth in the authorities, and as decided by this Court in the Halox case. And we have pointed at some length in our libellant's reply brief to the actual catalogs or manuals from the various school of chiropractics to show by their own language that they call for the actual practice of chiropractics to include only the manipulation of the spine or the body by hand, and that the other things that were taught in the schools of chiropractics were for the purpose of a well-rounded education, so that the chiropractor might know the limits of his practice, and might know the limits of his powers of healing, but that they did not enlarge the field of chiropractics itself, and that among those things was the field of physical therapy, in which this particular machine arises.

* * * * *

Mr. Hildreth: As a matter of record, if the Court please, Exhibits A and B were offered. Were they received?

The Court: They are offered at the present time in evidence?

Mr. Deutz: We are not going to object, your Honor. We doubt very much their weight as evidence in this case, but we won't object to their being in evidence.

The Court: They will be received.

(Thereupon the documents, heretofore marked Respondents' Exhibits A and B, were received in evidence.)

The Court: The matter will stand submitted.

[Endorsed]: No. 14802. United States Court of Appeals for the Ninth Circuit. A. Schlessing, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur", together with their labeling, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 30, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14802

A. SCHLESSING,

Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

APPELLANT'S STATEMENT OF POINTS

The Appellant, in accordance with Rule 17 (6), hereby sets forth the following statement of points which are concerned in this appeal.

The Appellant contends that the United States District Court erred in the following particulars:

(1) In not granting Appellant's motion for administrative approval of Appellant's proposed method of distributing the devices under seizure.

(2) In holding that the practice of chiropractic is limited to the definition:

"Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments."

(3) In holding that:

"Ultrasonic therapy * * * is not a part of the practice of chiropractic."

(4) In holding that the practice of chiropractic is a stationary science and the scope of practice is not expanded by scientific developments and increasing educational requirements and subjects taught in schools of chiropractic.

(5) In holding that:

“Ultrasonic therapy is not a necessary mechanical measure incident to the care of the body in the practice of chiropractic.”

(6) In holding that the practice of medicine is not permitted as a part of the practice of chiropractic under the California Chiropractic Act.

(7) In holding that:

“A chiropractor licensed under the laws of California is not authorized to use or direct the use of the ultrasonic devices under seizure in this case.”

(8) In holding that:

“The term ‘necessary mechanical * * * measures incident to the care of the body’ as used in Section 7 of the California Chiropractic Act further delineates the scope of a licentiate’s authority to assure his right to use only such measures as are necessary and incidental to the care of the body in the practice of chiropractic, such as a chiropractic table.”

(9) In holding that:

“Ultrasonic therapy is a part of the practice of medicine; it is not a part of the practice of chiropractic nor is it a ‘necessary mechanical * * * measure incident to the care of the body’ as that term is used in Section 7 of the California Chiropractic Act.”

(10) In holding that:

“The ultrasonic devices under seizure in this case do not bear adequate directions for use and are not exempt from that requirement.”

(11) In holding that there is no evidence before the court in support of the findings of fact.

(12) In holding that the evidence does not support the conclusions of law.

Dated: This 8th day of July, 1955.

SPENCER E. VAN DYKE and
JACK E. HILDRETH,

/s/ By SPENCER E. VAN DYKE,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION CONCERNING DESIGNA-
TION OF THE RECORD FOR PRINTING
(Civil Rule 17(6))

It Is Hereby Stipulated by the parties to this appeal, through their respective counsel, as follows:

A. The material portions of the record in the above-entitled action are hereby designated for printing and include:

1. Libel of Information.
2. Claim of A. Schlessing.
3. Consent Decree of Condemnation.
4. Stipulation and Order Scheduling Further Court Proceedings.
5. Stipulation as to Issue.

6. Stipulation of Facts (including Exhibit A).
7. Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure.
8. Supplemental Stipulation as to Facts.
9. Affidavit of Dr. Lee H. Norcross, D.C. (except attached exhibits).
10. Affidavit of Dr. Harold A. Houde, D.C., (except attached exhibits).
11. Affidavit of Dr. Carl Eric Hotchkiss, D.C. (except attached exhibits).
12. Affidavit of A. Schlessing.
13. Findings of Fact and Conclusions of Law.
14. Order.
15. Notice of Appeal (filed April 7, 1955).
16. Final Decree.
17. Order Staying Final Decree, Reducing Bond, and Permitting Removal of Devices.
18. Notice of Appeal (filed May 27, 1955).
19. Reporters' Transcript of Oral Proceedings, except that the following material shall not be printed: Page 1, lines 1 through 12; page 1, lines 16 through 26; page 2, lines 1 through 9; page 3, lines 1 through 25; page 4, lines 1 through 5; page 8, lines 16 through 25; page 9, lines 1 through 25; page 10, lines 1 through 25; page 11, lines 1 through 9; page 19, lines 1 through 3; page 20, lines 1 through 21.
- B. It Is Further Stipulated, subject to the approval of the court, that the following exhibits which are a part of the record on appeal, certified by the District Court, shall not be printed but

shall be presented to the court for consideration in said appeal in their original form:

1. Exhibits A and B, identified in and attached to the Affidavit of Dr. Lee H. Norcross, D.C.

2. Exhibits A, B, and C, identified in and attached to the Affidavit of Dr. Harold A. Houde, D.C.

3. Exhibits A and B, identified in and attached to the Affidavit of Dr. Carl Eric Hotchkiss, D.C.

4. The report entitled, "Effect of Single and Multiple Treatments on New Zealand White Rabbits with a Schlessing Ultrasoniseur", identified in the Reporters' Transcript of Oral Proceedings as Claimant's Exhibit A (R. T. page 5, lines 19 through 25).

5. The volume entitled "Spinal Adjustment" by Forster, (1915), identified in the Reporters' Transcript of Oral Proceedings as Claimant's Exhibit B (R. T. page 8, lines 8 through 15).

Dated: This 7th day of July, 1955.

SPENCER E. VAN DYKE and
JACK E. HILDRETH,

/s/ By SPENCER E. VAN DYKE,

Attorneys for Appellant
LAUGHLIN E. WATERS,
United States Attorney

/s/ By MAX F. DEUTZ,

Asst. U. S. Attorney, Chief of Civil
Division,
Attorneys for Appellee

[Endorsed]: Filed July 11, 1955. Paul P. O'Brien,
Clerk.

6. Stipulation of Facts (including Exhibit A).
7. Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure.
8. Supplemental Stipulation as to Facts.
9. Affidavit of Dr. Lee H. Norcross, D.C. (except attached exhibits).
10. Affidavit of Dr. Harold A. Houde, D.C., (except attached exhibits).
11. Affidavit of Dr. Carl Eric Hotchkiss, D.C. (except attached exhibits).
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18. Notice of Appeal (filed May 27, 1955).
19. Reporters' Transcript of Oral Proceedings, except that the following material shall not be printed: Page 1, lines 1 through 12; page 1, lines 16 through 26; page 2, lines 1 through 9; page 3, lines 1 through 25; page 4, lines 1 through 5; page 8, lines 16 through 25; page 9, lines 1 through 25; page 10, lines 1 through 25; page 11, lines 1 through 9; page 19, lines 1 through 3; page 20, lines 1 through 21.
- B. It Is Further Stipulated, subject to the approval of the court, that the following exhibits which are a part of the record on appeal, certificated by the District Court, shall not be printed but

shall be presented to the court for consideration in said appeal in their original form:

1. Exhibits A and B, identified in and attached to the Affidavit of Dr. Lee H. Norcross, D.C.

2. Exhibits A, B, and C, identified in and attached to the Affidavit of Dr. Harold A. Houde, D.C.

3. Exhibits A and B, identified in and attached to the Affidavit of Dr. Carl Eric Hotchkiss, D.C.

4. The report entitled, "Effect of Single and Multiple Treatments on New Zealand White Rabbits with a Schlessing Ultrasoniseur", identified in the Reporters' Transcript of Oral Proceedings as Claimant's Exhibit A (R. T. page 5, lines 19 through 25).

5. The volume entitled "Spinal Adjustment" by Forster, (1915), identified in the Reporters' Transcript of Oral Proceedings as Claimant's Exhibit B (R. T. page 8, lines 8 through 15).

Dated: This 7th day of July, 1955.

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[Endorsed]: Filed July 11, 1955. Paul P. O'Brien,
Clerk.

No. 14802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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No. 14802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States Court for the Southern
District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

This is an appeal from the judgment of the United States District Court for the Southern District of California, Central Division, by which the appellant's motion to compel administrative approval of his proposed method of distributing certain ultrasonic devices under seizure to chiropractors licensed by the law of the State of California was denied.

Statement of Jurisdiction.

The District Court had original jurisdiction to try this cause under the provisions of 21 U. S. C. 334(a) which provides in part as follows:

"Seizure—(a) Grounds and Jurisdiction.

Any article * * * that is adulterated or misbranded when introduced into, or while in interstate

commerce, or which may not, under the provisions of Sections 334 or 335 of this Title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court within the jurisdiction of which the article is found * * *.”

This Court has jurisdiction of the appeal under (new) 28 U. S. C., Sec. 1291 (June 25, 1948, Chap. 646, 62 Stat. 929), which provides as follows:

“Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, * * * except where a direct review may be had in the Supreme Court.”

And under (new) 28 U. S. C., Sec. 1294, Subd. (4), which provides in pertinent part as follows:

“Circuits in which decisions reviewable.

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district.”*

*Notices of Appeal were filed on April 7, 1955 and May 27, 1955. Two Notices of Appeal were filed due to the provisions of the Order made by the United States District Court on February 9, 1955 providing that Claimant could submit any other proposal for distribution within a period of ninety days from the entry of this Order. In order to comply with the rule that notices of appeal must be made within sixty days, a Notice of Appeal was filed from the Order of February 9, 1955, and the second notice after the period of ninety days had elapsed as set forth in said Order. Both notices are consolidated for this one appeal.

Proceedings in the District Court.

On September 5, 1952, the United States of America filed a libel of information in the United States District Court in and for the Southern District of California, Central Division, seeking condemnation of 75 devices, more or less, designated as "The Schlessing Ultrasoniseur." [Clk. Tr. pp. 3-7, incl.] The libel based on Section 21, U. S. C. 334(a) charged that the articles were misbranded in violation of 21 U. S. C. 352(a) and (f) (1).¹

The basis for this charge in the libel of information was that certain written statements and claims accompanied the devices when shipped that were false and misleading and in particular, represented and suggested that the devices provided an adequate and effective treatment for the cure of many diseases some of which could not be substantiated. [Clk. Tr. pp. 4-5.] That the libel further charged that additional false and misleading statements were made in connection with the operating instructions which accompanied the devices when shipped, as well as they did not bear adequate directions for use. [Clk. Tr. p. 6.]

¹21 U. S. C. 352 (a) *False or misleading label.*

"If its labeling is false or misleading in any particular."

(f) *Directions for use and warnings on label.*

"Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided*, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

The libel of information further alleged that the articles were misbranded within the meaning of 21 U. S. C. 351(c)² in that the device's strength differed and its quality fell below that which they purported and were represented to possess. [Clk. Tr. p. 6.]

On October 22, 1952, Mr. A. Schlessing, President of A. Schlessing & Co., intervened as Claimant in this proceeding. [Clk. Tr. p. 8.] The devices had been sold by A. Schlessing & Co., located in St. Louis, Missouri, to various chiropractors practicing in Southern California.

That on October 22, 1952, a Consent Decree of Condemnation was entered by the terms of which the devices under seizure were allowed to be returned to the Claimant pursuant to 21 U. S. C. 334(d)³ to accord the Claimant the privilege of attempting to bring the devices into compliance with the law under supervision of a duly authorized

²21 U. S. C. 351 (c) *Misrepresentation of strength, etc., where drug is unrecognized in compendium.*

"If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess."

³21 U. S. 334 (d) *Disposition of goods after decree of condemnation.*

"Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold: *Provided*, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which

representative of the Federal Security Administrator.⁴ The Consent Decree further declared in substance that the Claimant would not distribute the devices until a written release was obtained from a representative of the Federal Security Administrator. [Clk. Tr. pp. 8-14, incl.]

On May 24, 1954, Claimant filed a motion to compel administrative approval of Claimant's proposed method of distributing devices under seizure. [Clk. Tr. p. 27,] Said motion was heard in the United States District Court in and for the Southern District of California, Central Division, on November 22, 1954, and subsequently on December 22, 1954.

On February 10, 1955, the said Court denied Claimant's motion which, if granted, would have permitted distribution of the devices to chiropractors in California, and extended to the Claimant a period of ninety days with which to submit to the Department of Health, Education and Welfare any other proposal for distribution. [Clk. Tr. pp. 49-50.]

sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under section 344 or 355 of this title, be introduced into interstate commerce, shall be disposed of by destruction."

⁴The Consent Decree of Condemnation filed in this case on October 22, 1952, directed that the condemned devices be brought into compliance with law under the supervision of the Federal Security Administrator who was then the head of the Federal Security Agency. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953 and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare established to administer the functions formerly in the said Agency under the supervision and direction of the Secretary of that Department. (18 Fed. Reg. 2053.)

Subsequently, on May 17, 1955, the said Court entered its Final Decree and the Court, having been advised by the parties that Claimant had no other additional proposal for distribution and chose to stand on the proposal which was rejected by the Court, it was ordered that the Claimant return the devices to the United States Marshal for this district and that such devices were to be offered for sale by the said United States Marshal under conditions to be approved by the Los Angeles District of the Food and Drug Administration, Department of Health, Education and Welfare. [Clk. Tr. pp. 51-53.]

On May 17, 1955, an order was made staying the final decree, reducing the bond, and permitting removal of the devices. [Clk. Tr. p. 54.]

That Appellant thereupon commenced this appeal.

Statement of Facts.

That on the 5th day of September, 1952, the United States of America filed a libel of information and seized 47 machines known as "The Schlessing Ultrasoniseur." This machine is an ultrasonic device used to give a deep massage to patients afflicted with osteoarthritis and bursitis. [Clk. Tr. p. 22; Affidavit of A. Schlessing, Clk. Tr. pp. 37-40, incl.] That negotiations conducted on behalf of the owners of these devices, all being chiropractors licensed by the law of the State of California, by Mr. Schlessing and the Federal Food and Drug Administration resulted in the entry of the Consent Decree on October 22, 1952. As a result of the Consent Decree Mr.

Schlessing was given possession of the machines for the purpose of conducting experiments to demonstrate the safety and therapeutic value of the machine and to present to the Food and Drug Administration, Washington, D. C., labeling to which they had no objection. The Claimant thereupon shipped the 47 devices seized to his place of business at St. Louis, Missouri, where six of them were reconditioned from a physical standpoint to the satisfaction of the Department of Health, Education, and Welfare,⁵ conducted numerous experiments and tests under the supervision of a representative of the Department of Health, Education, and Welfare, satisfying that agency that the machines had therapeutic value and submitted various proposed labels. The Department has no objection to the labeling set forth as Exhibit A attached to the Stipulation of Facts. [Clk. Tr. pp. 20-27, incl.] Claimant thereupon requested the Department for authority to return the devices in question to their owners. [Clk. Tr. p. 18.] Whereupon the Department refused Claimant's request. This refusal to release the reconditioned devices was based on the Department's view that chiropractors do not come within the exemption to the exemptions of the labeling division contained in 21 U. S. C. 352(f)(1), where a device is such that it cannot be labeled with adequate directions for its use. That these exemptions contained in 21 Code of Federal Regulations, Section

⁵The Food and Drug Administration was placed under the supervision of the Department of Health, Education, and Welfare April 11, 1953 *Cf.* footnote 1. [Clk. Tr. p. 27.]

1.106^b provide that where adequate labeling cannot be affixed to a device and that where practitioners are licensed by law to use the devices that the device may be labeled by affixing to the device a statement that federal law restricts the sale of the device to the profession so licensed. The Department refused to allow Appellant permission to distribute the devices with such a label containing the word chiropractor. Whereupon Appellant filed the motion in the District Court, subject of this appeal. That in connection with this motion it became necessary to determine the scope of the practice of chiropractic within the meaning of the Chiropractic Act of the State of California. Evidence as to the scope of the practice of chiropractic on November 7, 1922, and shortly prior thereto (the date of the passage of the Act) was offered by way of affidavit and exhibit.

^b21 *Code of Federal Regulations, Section 1.106.*

“(d) *Exemption for prescription devices*

“A device which, because of any potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and hence for which ‘adequate directions for use’ cannot be prepared, shall be exempt from section 502(f)(1) of the act [21 U. S. C. 352(f)(1)] if all the following conditions are met:

* * * * *

“(2) The label of the device (other than surgical instruments) bears:

“(i) The statement ‘Caution: Federal law restricts this device to sale by or on the order of a’, the blank to be filled in with the word ‘physician,’ ‘dentist,’ ‘veterinarian,’ or with the descriptive designation of any other practitioner licensed by the law of the state in which he practices to use or order the use of the device; and

“(ii) The method of its application or use.

“(3) The labeling of the device (which may include brochures readily available to licensed practitioners) bears information as to the use of the device by practitioners licensed by law to use it or direct its use. . . .”

Statement of Case.

The primary question is whether a chiropractor, who is licensed under the California Chiropractic Act, is a practitioner licensed by law to use or direct the use of devices such as the six reconditioned ultrasonic therapeutic devices involved in this case, so as to satisfy the requirements of 21 C. F. R., Sec. 1.106(e), as amended, and exempt the devices from complying with 21 U. S. C. 352 (f)(1).

In the Stipulation of Facts [Clk. Tr. p. 19, line 5], it is agreed that Ultrasonic therapy cannot be employed safely and efficaciously by the layman in self-medication, but requires competent supervision in its administration; that adequate directions for unsupervised lay use cannot be written for ultrasonic devices, within the meaning of 21 U. S. C. 352(f)(1). It is further agreed that interstate distribution which would not violate the Federal Food, Drug, and Cosmetic Act must therefore comply with the regulations which exempt devices from bearing adequate directions for use in their labeling. (21 C. F. R., Sec. 1.106, as amended.) One provision of these regulations exempts a device which is shipped to "a practitioner licensed by law to * * * use or direct the use of the device." (21 C. F. R., Sec. 1.106(e).)

The United States District Court in ruling upon Appellant's motion before such court held that the practice of chiropractic was limited to the following definition:

"Chiropractic is a system for the practice of adjusting the joints, especially of the spine, by hand, for the treatment of disease and ailments."

Under this ruling it appears that chiropractors would be denied the use of any and all devices of whatever nature

and be limited strictly to the use of the hands. The adoption of this limited definition of chiropractic would prevent the use by chiropractors of all manner of devices used as adjunct therapy to adjustment of the spine. Chiropractors in this state have used various devices in connection with the use of adjunct therapy since long prior to the passage of the Chiropractic Act of 1922. Among such devices are the general use of all types of diathermy, galvanic and sinusoidal currents, ultra violet light, infra red light and other forms of light and sound therapy together with a variety of massage, friction and vibratory instruments.

There is no attempt being made in this case to enlarge the scope of chiropractic under the provisions of the California Chiropractic Act. Such Act provides for proper safeguards in Section 7 thereof, to the effect that Chiropractors are not authorized to practice medicine, surgery, osteopathy, dentistry or optometry, nor use any drug or medicine now or hereafter included in *materia medica*. This appeal is brought to contest the extremely restrictive definition of chiropractic adopted by the District Court and to clarify the scope of chiropractic under California Law in order that ethical chiropractors in this state may be protected in their efforts to effectively practice their profession and not have the scope of such practice continuously subject to interpretation by the lower courts.

Specification of Errors.

The Appellant contends that the United States District Court erred in the following particulars:

1. In holding that the practice of chiropractic is limited to the definition:

“Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments.”

2. In holding that:

“Ultrasonic therapy * * * is not a part of the practice of chiropractic.”

3. In holding that the practice of chiropractic is a stationary science and the scope of practice is not expanded by scientific developments and increasing educational requirements and subjects taught in schools of chiropractic.

4. In holding that:

“Ultrasonic therapy is not a necessary mechanical measure incident to the care of the body in the practice of chiropractic.”

5. In holding that:

“A chiropractor licensed under the laws of California is not authorized to use or direct the use of the ultrasonic devices under seizure in this case.”

6. In holding that:

“The term ‘necessary mechanical * * * measures incident to the care of the body’ as used in Section 7 of the California Chiropractic Act further delineates the scope of a licentiate’s authority

to assure his right to use only such measures as are necessary and incidental to the care of the body in the practice of chiropractic, such as a chiropractic table.”

7. In holding that:

“Ultrasonic therapy is a part of the practice of medicine; it is not a part of the practice of chiropractic nor is it a ‘necessary mechanical * * * measure incident to the care of the body’ as that term is used in Section 7 of the California Chiropractic Act.”

8. In holding that:

“The ultrasonic devices under seizure in this case do not bear adequate directions for use and are not exempt from that requirement.”

9. In holding that the Findings were supported by the evidence.

10. In holding that the conclusions of law were supported by the Findings.

Summary of Argument.

Appellant’s argument is made under 12 major points. (See topical index.) In determining the primary question of this appeal, namely, whether a chiropractor licensed under the California law is authorized to use the devices in question, it is necessary to define and determine the scope of the chiropractic profession on, prior and subsequent to November 7, 1922. In short summary Appellant submits that prior to the passage of the Chiropractic Act of 1922 the practice of chiropractic consisted

of several theories and methods in use and practiced by those licensed under the Drugless Practitioners Act—there was no well known or defined definition of the scope of chiropractic. In 1922 when the Act was passed the practice consisted of the adjustment of the spine together with the use of adjunct therapy practiced by the Drugless Practitioner and the scope and extent of which, must be determined by reference to that which was taught as chiropractic in schools and colleges.

Physiotherapy as the term is now understood, is, and was, within the scope of chiropractic, it being one of the recognized adjunct therapies advocated and used by the practicing chiropractors in 1922. The devices in question are devices intended for use in physiotherapy treatment and have been developed along with other scientific advancements as an improvement in the method and practice in this field. Chiropractic is not a stationary method of healing; new methods and scientific advancements in this are as available to the chiropractor as to any other profession practicing the healing arts.

A reexamination of the scope of chiropractic and the cases construing the Chiropractic Act reveal that the chiropractor is not limited solely to adjustment of the spine by hand in the treatment of diseases and ailments.

I.

The Scope of the Practice of Chiropractic in the State of California.

The practice of chiropractic in the State of California is authorized under and by virtue of the Chiropractic Act which was an initiative Act passed November 7, 1922, and became effective on December 21, 1922. The provisions of this Act are contained in the appendix attached hereto.

A. Background of the Practice of Chiropractic in the State of California.

Prior to the time of the passage of the Chiropractic Initiative Act of 1922, all of the systems or modes of the healing of the sick in the State of California was regulated by the Medical Practice Act, now repealed (Deering's General Laws, 1931 ed., Act. 4807). Section 17 of this Act made it unlawful to practice any of them without a certificate which could be obtained, under that Act, only from the Board of Medical Examiners. Section 8 of the Act authorized such Board to issue four forms of certificates, designated as (1) Physician and Surgeon Certificate; (2) Drugless Practitioner's Certificate; (3) Certificate to practice Chiropody, and (4) Certificate to practice Midwifery. Chiropractors were licensed under the Drugless Practitioner's Certificate.

Historically, the chiropractic theory was first noted in about 1895 by D. D. Palmer. In 1903, B. J. Palmer, the son of D. D. Palmer, advocated this science as a

system for the prevention and curing of disease. B. J. Palmer, as the founder of the Palmer College, believed and taught that all disease of whatsoever kind and nature could be prevented or cured by spinal adjustment without resort to any kind of adjunct therapy. Practical experience soon taught those schooled in medical and scientific background that D. D. Palmer and B. J. Palmer adopted theories and practices that were erroneous when used in the cure and treatment of disease.

Study and research by various men in the field of chiropractic adjustment resulted in the modification of the theories and practices of D. D. Palmer and B. J. Palmer as well as new theories and practices. Long prior to 1922 other schools of chiropractic had developed which disagreed with Palmer's theories and which advocated spinal adjustment together with adjunct therapy as a method for the treatment of various diseases and ailments. As an example of this, the students of the Eclectic College of Chiropractic in Los Angeles, later the Los Angeles College of Chiropractic between the years 1920 and 1924 used and accepted the method of chiropractic advocated in one of their text books entitled "Spinal Adjustments," published in 1915 by Arthur L. Forster, Md.D., D.C. [App. Ex. P.]

It is stated on page 4:

"Palmer, however, fell into one serious error. He did as so many before him have done. He became overzealous. He claimed that all disease is due to subluxations of the vertebrae and that all disease

could be eradicated by adjustment of the vertebrae. Naturally, such views could not be subscribed to by anyone with a liberal training in the sciences underlying the art of healing and especially, one with a knowledge of pathology. This preliminary training Palmer lacked; and it goes without saying that had he possessed such knowledge, he would not have made the claims which he did. He derided all other forms of therapy and persisted in his original views to the end. *Nevertheless, while the advancement made in chiropractic techniques has been very great, and broader views now obtain among the profession as a whole, still to Palmer must be given the credit for furnishing the impetus which carried chiropractic to a recognition of its wonderful possibilities.*" (Emphasis added.)

"It was, however, only natural that of all his disciples there should be some who could not agree with Palmer's views in their entirety. And such a condition of affairs really did arise. There were some who devised what they considered more accurate methods of spinal analysis to determine the existence of possible subluxations. Others originated different thrusts for the adjustment of the different kinds of subluxations. Still others, in addition to making changes in the manner of palpating and the forms of thrusts applied, incorporated adjunct methods of physiological therapy, such as attention to diet, hydrotherapy, massage, et cetera."

II.

The Theories of Chiropractic Within the Meaning of the Chiropractic Act Taught in the Schools and Colleges in 1922 and Prior Thereto.

There were many schools and colleges of chiropractic prior to 1922 many of which taught chiropractic theories and methods much different from the Palmer School previously referred to.

Prior to 1922, Alva A. Gregory, M.D., conducted a chiropractic school known as the Palmer-Gregory College in Oklahoma City, Oklahoma. His textbook entitled, "Disease and Rational Therapy," published by Palmer-Gregory College in 1913, stated as follows:

"The following methods of drugless healing, we believe to be effective methods of treatment, and far superior to the ordinary methods of drug and surgical practice now in vogue.

"We do not believe that these methods, either one or all of them, contain all the virtue there is in the different methods of the healing art, but we do believe that their adoption and use collectively, will reduce human suffering by combating the inroads of disease and by the prevention of premature death.

"The methods which we recommend and use in drugless therapy, we enumerate under the following heads:

1. Fasting.
2. Dieting.
3. Suggestion.
4. Elimination.
5. Spondylotherapy.
6. Rectal dilation.
7. Physical Culture."

Joy M. Loban, D.C., Ph.C., was dean of the Pittsburgh College of Chiropractic. In his book entitled "Technic and Practice of Chiropractic," published by Loban Publishing Co., in 1918, he makes the following statements regarding the use of adjunct therapy in connection with chiropractic:

"There are many methods of treating disease which are more or less beneficial to the patient just as there are some which are always injurious. Shall we employ such of these methods as are beneficial as adjuncts to the practice of Chiropractic? Or shall we adhere to the principle that the treatment of disease is erroneous and the adjustment of its cause the only logical method of procedure? There is much to be said on both sides of this question which has so long agitated the profession.

"In the class of beneficial adjuncts may be placed massage, hydrotherapy, spondylotherapy, dietics, osteopathy, Christian Science, suggestive therapeutics, mechano-therapy and many others. Each of these has its field of usefulness; each taken alone is productive of some good in some cases at least. Each might possibly augment the results of Chiropractic, or hasten them in some cases, if judiciously used. By 'judiciously used' we mean the avoidance of any method which would in the least interfere with proper vertebral adjustment or its results or which might carelessly cause subluxation. Osteopathy and mechano-therapy frequently cause subluxation because of ignorance on the part of their users; they need not do so."

Another chiropractic college that operated prior to 1922 was the Carver Chiropractic College, in Oklahoma. The dean of this school was Willard Carver, L.L.B., D.C..

In his textbook entitled "Carver's Chiropractic Analysis," published by Roycrafters Co. in 1909, he states as follows:

"As a sequel to its growth, the science of Chiropractic may now be said to consist of two principal parts: (1) *The science of function*; and (2) *the science of adjustment*.

"*The science of function*, it will be readily seen, is of primary and vast importance, and in this sense vastly superior to the second. It inherently includes all knowledge of *anatomy, physiology, and function, normal and abnormal*, which again includes *symptomatology and diagnosis*.

"*The science of adjustment*, while of secondary importance from the standpoint of a scholar or doctor, is clearly of primary importance in the scope of its office, which goes broadly into the details of *articulations, displacements, impingements, and restorations*, which, it may be easily seen, include much anatomy and all of the physiology of articulations. *Adjustment* must never be confused with *adjusting*, which is the *art of securing, by hand, the proper relation of the elements of a joint*."

Another school of chiropractic was operated by J. S. Riley, who was the dean of the Washington School of Chiropractic. In his book entitled, "Science and Practice of Chiropractic with Applied Sciences," published by the author in 1919, he reveals that this school of chiropractic advocated spinal concussion treatments as an adjunct to drugless therapy. This school advocated the use of a device known as a "concussor" which was operated by electric current. The spinal concussion was applied to nerve centers as distinguished from strictly spinal adjustment.

Various schools of chiropractic are referred to in the Encyclopedia Americana, published in 1922. On page 568 under the general category of Chiropractic it says:

“Education.—There are several competent schools. The Palmer School of Chiropractic at Davenport, Iowa, is the oldest and one of the largest. The course of study in these institutions in point of hours equal 4,037, which is slightly in excess of the average four years medical school excluding the hours used in medical schools for materia medica, major surgery, etc. Studies taught are anatomy, physiology, symptomatology, pathology, minor surgery, obstetrics, microscopy, chemistry, bacteriology, gynecology, biology (in addition to which are those original to Chiropractic, viz., cycles, equations, metric system, serous circulation, intellectual adoption, adjustment, palpation, nerve tracing, analysis, chiropractic orthopody, anomology, restoration, spinography, etc.). Among the other modern good schools is the Universal Chiropractic College, also located at Davenport, Iowa; The Pittsburgh College of Chiropractic; The Carver Chiropractic College; Oregon Chiropractic School; Rudledge Chiropractic College. These institutions maintain a residual course of sufficient length in which 100 per cent of attendance is required.”

Further evidence of the teachings of chiropractic which differed from the Palmer theory is shown from excerpts from text books used by some of the schools and colleges referred to in the Encyclopedia Americana. These excerpts reveal that adjunct therapy was advocated along with spinal adjustment for the treatment of disease and ailments prior to 1922. [See App. Ex. B, “Spinal Adjustment,” by Arthur L. Forster, M.D., D.C.]

From the foregoing it is evident that there were many schools and colleges of chiropractic, other than the Palmer College, which had been teaching the science of chiropractic prior to the Chiropractic Initiative Act of 1922. Graduates from these schools were practicing chiropractic in the State of California prior to and during the year 1922 under the authority of the Drugless Practitioner's Certificate, and practiced the method of chiropractic taught and advocated by their particular school or college. Consequently, when the Initiative Act of 1922 was prepared it provided in Section 7⁷ thereof that one form of certificate would be issued by the Board of Chiropractic Examiners which was designated "license to practice chiropractic." This language was used in Section 7 of the Chiropractic Act to show that there would be but one certificate for all schools of chiropractic as distinguished from separate certificates for each of the methods taught by various schools or colleges. This fact is further emphasized by Section 16 of the Chiropractic Act which provides in part as follows: "Nor shall this Act be construed so as to discriminate against any particular school of chiropractic, or any other treatment . . ." Throughout the Act where "schools of chiropractic" are mentioned, it refers to the various theories of chiropractic being taught by various schools at that time as distin-

⁷"Sec. 7. One form of certificate shall be issued by the Board of Chiropractic Examiners, which said certificate shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica."

guished from the actual physical location of schools and colleges of chiropractic. Any other construction would make meaningless the provisions in Section 16 to the effect that the Chiropractic Act should not be construed so as to discriminate against any particular school of chiropractic.

III.

The Chiropractic Act of 1922 Adopted a Broad Definition of Chiropractic Which Included the Use of Adjunct Therapy and Methods Previously Used by Practitioners Under the Drugless Practitioners Act.

In 1922 and for some time prior thereto the difference in chiropractic philosophy had developed into a heated controversy. The advocates of the Palmer theory and technique were sometimes referred to as "straights" while the advocates of the broader theory and technique of chiropractic were referred to as "mixers." The latter group included in their chiropractic practice other methods of treating nerve interference not only at the spinal vertebrae but at any place in the body that nerve continuity was occluded. This group further advocated and practiced adjunct therapy to accomplish this result. Many of the so-called "straights" refused to become licensed under the Drugless Practitioners Act which was in existence prior to the Chiropractic Act of 1922.⁸ This ultimately

⁸The minimum educational requirements as set forth in the Drugless Practitioners Act contained in Section 2231 of the Business and Professions Code, repealed by the addition of Section 2232 and Section 2497 of the Business and Professions Code, Stats. 1949, Ch. 23:

"§2231. *Evidence of professional instruction: Duration of courses:* Schedule of hours. Each applicant shall show by evidence satisfactory to the board that he has attended three resident courses

resulted in the case of *The People v. Ray S. La Barre* (1924), 193 Cal. 388, 224 Pac. 750.

In this case *quo warranto* proceedings were instituted to remove the five members of the first State Board of Chiropractic Examiners appointed by the Governor under the power conferred by the initiative measure known as the Chiropractic Act of 1922. Section 1 of the Act provided that

“Each member of the Board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder . . .”

It was an admitted fact in the case that none of the five members of the Board of Chiropractic Examiners

of professional instruction in a school approved by the board, but these courses need not necessarily have been pursued continuously or consecutively. Each course shall not have been of less than thirty-two weeks in duration, and the total number of hours for all courses shall consist of three thousand hours according to the following schedule:

“Group 1. 600 hours.

Anatomy	485 hours
Histology	115 hours

Group 2. 500 hours.

Elementary chemistry and toxicology.....	200 hours
Physiology	300 hours

Group 3. 550 hours.

Elementary bacteriology.....	200 hours
Hygiene	100 hours
Pathology	250 hours

Group 4. 500 hours.

Diagnosis	500 hours
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Group 5. 500 hours.

Manipulative and mechanical therapy.....	500 hours
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Group 6. 350 hours.

Gynecology	150 hours
Obstetrics	200 hours

Total	3000 hours”
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appointed under the Chiropractic Act was ever the holder of a license or certificate issued by the State Medical Board to practice either as a physician and surgeon or as a drugless practitioner. It was admitted that all treatments administered by the members of the Board were done without authority of law and in violation of the law. It was further stipulated that at the time said initiative act went into effect there were 91 persons lawfully qualified to practice within the State as chiropractors and who had been actually engaged in said practice for the term required by the Act under the authority of the drugless practitioners certificate.

The Supreme Court upheld the action of the trial court to the effect that the appointees were wanting in the legal qualifications necessary to entitle them to occupy the respective offices to which they had been appointed. The Court states on page 393:

“The word ‘practice’ means, of course, engagement in the treatment or healing of the sick in accordance with the rules which the state in the exercise of the police power has prescribed. It is not necessary to read into the act, as appellants so vigorously insist, the word ‘lawful’ or ‘legal’ before the word ‘practice’ in order to justify the conclusion that the act contemplates the holding of a license under the Medical Practice Act as a prerequisite for eligibility on the part of an appointee to membership in said board. Lawfulness is a fixed element which inheres in every statute.”

It is evident from the foregoing that from the inception of the California Chiropractic Act the practice of chiropractic was not limited to the Palmer theory to the effect that all disease could be cured by the adjustment of

the spine by hand but included the use of adjunct therapy. The Act contemplated that those chiropractors, practicing in this State, under the Drugless Practitioners Certificate, who advocated the use of adjunct therapy would continue to practice and use every procedure which serves to locate and correct nerve interference.

IV.

The Manner of Determining the Scope of the Practice of Chiropractic in California.

A. An Examination of the California Cases on the Scope of the Practice of Chiropractic Does Not Show That There Has Been a Determination of the Exact Scope of the Practice of Chiropractic Under the Chiropractic Act of 1922, as Amended.

It appears that the reason for the lack of a comprehensive definition of the practice of chiropractic in California has been that the courts have not been called upon to squarely determine this question. In most California cases the court has been called upon to determine primarily a criminal issue rather than to define the full scope of the practice of chiropractic. From the earliest cases the California courts have taken the position that evidence must be introduced to show the scope and practice of chiropractic at the time of the initiative Chiropractic Act of 1922 and in the absence of such evidence the courts have not been in a position to decide the primary issue presented in this case.

In the case at bar evidence has been presented by way of affidavits and exhibits to the court in support of appellant's motion that is sufficient to determine this question and thus in an examination of the following California cases the court was without the benefit of such evidence.

B. The California Cases on This Subject Have Been Examined and Indicate That It Is the Duty of the Trial Court to Examine Each Case With Reference to the Evidence as to Whether or Not the Particular Phase Involved Was Within the Meaning of the Term and Scope of the Practice of Chiropractic of the State of California.

In the case of *In re Hartman* (1935), 10 Cal. App. 2d 213, a licensed chiropractor was charged with a violation of the Chiropractic Act by unlawfully using the term physician and advertising himself as such; petitioner in that case had been convicted on other counts charging him with the possession of certain hypodermic instruments and with the use thereof. The court held that such activity on the part of the chiropractor could not be classed as a measure incident to the care of the body within the meaning of that portion of Section 7 of the Chiropractic Act which states: “. . . and also to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body . . .” Apparently no effort was made in such case to affirmatively establish by competent evidence what the scope of chiropractic consists of since the court states as the bottom of page 217:

“It cannot be told, aside from the evidence, whether the method of treatment here in question is or is not a part of the practice of chiropractic. What constitutes chiropractic and what is included in such a practice is not defined in this act and could only be determined by the taking of evidence. As the court said in *Evans v. McGranaghan*, 4 Cal. App. 2d 202, 41 P. 2d 937: ‘The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. *But the court has no way to determine the scope of chiropractic as taught in*

such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper.' Even if we could properly review the evidence in this proceeding there is no evidence in the record before us which would support a finding that the use of a hypodermic needle or the injection of an antitoxin is a part of chiropractic or included in whatever is covered by that word (emphasis added), and no evidence to the effect that such forms of treatment do not constitute the practice of medicine. On the other hand, the only evidence in the record is to the effect that two physicians, as expert witnesses, would testify that in their opinion these things constitute the practice of medicine and surgery and that a licensed chiropractor as an expert witness would testify that in his opinion the methods in question would not constitute a part of the practice of chiropractic."

In the case of *Evans v. McGranaghan* (1935), 4 Cal. App. 2d 202, 41 P. 2d 937, the respondent was a licensed chiropractor and entered into a contract in writing whereby respondent agreed to treat the appellant for a period of one year. The contract contained the following provision:

"The said services shall include chiropractic adjustment, and all mechanical, hygienic and sanitary measures incident to the care of the body deemed necessary by the party of the second part (respondent), and such mechanical, hygienic and sanitary measures shall include diet, concussion, traction, enemas, diathermy, sinusoidal, galvanic, Sunlite, cold quartz, massage, baths, hot and cold packs, manipulation, massage, X-ray, Laboratory tests, and such other like measures, provided that such measures or

modes of treatment are within the scope of the practice under the provisions of the Chiropractic Act of California. . . .”

The court held in that case that where a plaintiff is seeking a construction of a contract which depends upon the determination of the scope of practice allowed to the defendant under his license and the determination of such scope of practice depends upon evidence, it is incumbent upon plaintiff to produce it and in the absence of such evidence, the court would not take testimony for the purpose of reversing a judgment. The court states on page 204:

“As we construe section 7 of the Chiropractic Act it authorizes the license holder to practice chiropractic as taught in chiropractic schools or colleges, regardless of whether such practice would have been construed as the practice of medicine, surgery, osteopathy, denistry or optometry prior to the enactment of the Chiropractic Act. It contains no definition of ‘chiropractic as taught in chiropractic schools or colleges’ and hence in the absence of evidence on that subject it is impossible of precise construction. The act further, in our judgment, authorizes the license holder to use all necessary mechanical and hygienic and sanitary measures incident to the care of the body which are included in chiropractic as taught in chiropractic schools or colleges, if any there be (a subject upon which in the absence of evidence as to what is included in chiropractic as so taught we cannot reach any conclusion), together with any other such necessary mechanical, hygienic and sanitary measures the use of which would not constitute the practice of medicine, surgery, osteopathy, denistry or optometry, nor involve the use of any drug or medicine now or hereafter included in *materia medica*.”

The court further states on page 205 as follows:

“ . . . that in order to determine the scope of the words ‘chiropractic as taught in chiropractic schools or colleges’ resort must be had to extrinsic evidence. The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. But the court has no way of determining the scope of chiropractic as taught in such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper. (Emphasis added.) (*People v. Borda*, 105 Cal. 636, 639, 640 [38 Pac. 1110]; 59 C. J., p. 1037.) This ruling comports with the holding of the appellate department of the Superior Court of Los Angeles County in *People v. Schuster*, 122 Cal. App. (Supp.) 790, 794, 795 [10 Pac. (2d) 204].”

V.

Evidence Presented in the District Court Reveals That the Subjects Taught in Schools and Colleges Prior to and at the Time of the Adoption of the Chiropractic Act of 1922 Did Not Restrict Chiropractic to Adjustment of the Spine by Hand.

The Affidavits of Dr. Lee H. Norcross, D. C., Dr. Harold A. Houde, D. C. and Dr. Carl Eric Hotchkiss, D. C. filed in support of Appellant's Motion for Administrative Approval along with the exhibits identified in and attached to the Affidavits shows the following:

Dr. Lee H. Norcross D. C., enrolled as a student in the Los Angeles College of Chiropractic in May, 1922 and graduated from said College on May 2, 1924; that he subsequently received the degree of Doctor of Naturopathy (N. D.) and the degree of Philosopher of Chiropractic (Ph. C.). Exhibit “A” attached to this affidavit

sets forth the subjects which he took at this college between May, 1922 and May 2, 1924. They are as follows:

Anatomy	580 hours
Histology	95 hours
Elem. Chem. and Toxicology	113 hours
Physiology	224 hours
Bacteriology	125½ hours
Hygiene and Sanitation	107½ hours
Pathology	194 hours
Diagnosis or Analysis	418 hours
Chiropractic Theory and Practice	516½ hours
Obstetrics and Gynecology	109 hours
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Total	2,482½ hours

The affidavit of Dr. Harold A. Houde, D. C. shows that he was a student at the Los Angeles College of Chiropractic from October, 1920 through September, 1922. Photostatic copies of his record was marked Exhibit "A" and a photostatic copy of the course of instruction covering 4,000 hours offered to students of said college from October, 1920 through January, 1924 marked Exhibit "B" attached to the affidavit shows the following.

"COURSE OF INSTRUCTION

The course of instruction covers 4,000 hours as follows:

ANATOMY	800 Hrs.
I. Osteology	800 Hrs.
II. Myology	100 Hrs.
III. Angiology	100 Hrs.
IV. Brain	200 Hrs.
V. Neurology	100 Hrs.

VI. Splanchnology	100 Hrs.
VII. Regional Anatomy	100 Hrs.
HISTOLOGY	100 Hrs.
EMBRYOLOGY	100 Hrs.
ELEMENTARY CHEMISTRY AND TOXICOLOGY	100 Hrs.
ORTHOPEDICS	100 Hrs.
PHYSIOLOGY	200 Hrs.
I. Physiology of Digestion	50 Hrs.
II. Physiology of Circulation	50 Hrs.
III. Physiology of Respiration	50 Hrs.
IV. Physiology of the Nerves	50 Hrs.
BACTERIOLOGY	100 Hrs.
HYGIENE AND SANITATION	100 Hrs.
PHYSICS	100 Hrs.
PATHOLOGY	
(General 100 Hrs., Special 100 Hrs.)	200 Hrs.
BIOLOGY	100 Hrs.
DIAGNOSIS	850 Hrs.
I. Infectious and Systematic Diseases	100 Hrs.
II. Pediatrics	50 Hrs.
III. Dermatology and Syphilis	50 Hrs.
IV. Physical Diagnosis, Urine Analysis, X-ray	200 Hrs.
V. Nervous and Mental Diseases	200 Hrs.
VI. Genito-Urinary Diseases	100 Hrs.
VII. Eye, Ear, Nose and Throat Diseases	100 Hrs.
VIII. Geriatrics	50 Hrs.
MINOR SURGERY	100 Hrs.
CHIROPRACTIC THEORY AND PRACTICE	300 Hrs.
GYNECOLOGY	100 Hrs.
OBSTETRICS	200 Hrs.
ACTIONS OF DRUGS	50 Hrs.

NATUROPATHIC METHODS	400 Hrs.
I. Massage	50 Hrs.
II. Hydrotherapy	100 Hrs.
III. Dietetics	50 Hrs.
IV. Electrotherapy	100 Hrs.
V. Spondylotherapy	25 Hrs.
VI. Hyperemic (Cupping)	25 Hrs.
VII. Psychology	25 Hrs.
VIII. Medical Jurisprudence	25 Hrs.
	<hr/>
	4,000 Hrs.

Also 800 Chiropractic adjustments are required.

The affidavit of Dr. Carl Eric Hotchkiss, D. C. shows that he enrolled in the Eclectic College of Chiropractic June 1, 1920 and graduated on June 1, 1921, a transcript of the hours and subjects taken attached to the affidavit marked Exhibit "A" shows the following:

Anatomy	800 hours
Physiology	300 hours
Histology	150 hours
Chemistry and Toxicology	200 hours
Hygiene and Sanitation	100 hours
Bacteriology	100 hours
Pathology	200 hours
Obstetrics and Gynecology	300 hours
Diagnosis or Analysis	500 hours
Chiropractic Theory and Practice	600 hours
Physical Therapy	200 hours
Minor Surgery	75 hours
X-ray	75 hours
	<hr/>
Total	3,600 hours

The affidavits referred to show that in the Los Angeles College of Chiropractic one of the textbooks used by the College was the "Principles and Practice of Spinal Adjustment," by Arthur L. Forster, published at Chicago, the National School of Chiropractic, copyright 1915. [App. Ex. B.] These affidavits show further that at the time of the passage of the Chiropractic Act there were several theories or schools of Chiropractic, a majority of which taught and advocated the broad Forster definition of chiropractic as opposed to the special brand of chiropractic that was taught by the Palmer school.

The subjects heretofore set forth shows what was actually taught in the Los Angeles Chiropractic College prior to and during the year 1922. The affidavits show that a majority of the colleges in California taught similar courses or subjects. The knowledge of what was taught in such schools and colleges can therefore be applied to that provision of Section 7 of the Chiropractic Act which defines the scope of "chiropractic" as . . . "taught in chiropractic schools and colleges."

Exhibit "A" attached to the affidavit of Dr. Carl Eric Hotchkiss, D.C., shows that 200 hours of Physical Therapy was taught at the Los Angeles College of Chiropractic which was formerly called the Eclectic College of Chiropractic.

VI.

The Use of Adjunct Therapy in Addition to Spinal Adjustment Was Taught in Schools and Colleges Prior to and During the Year 1922 and Its Use Is Therefore Included Within the Meaning of the Term Chiropractic as Defined in the California Act.

Appellant's Exhibit "B" is a textbook used by the Los Angeles Chiropractic College and the National School of Chiropractic entitled "Principles and Practice of Spinal Adjustment," by Arthur L. Forster, copyright, 1915, by the National School of Chiropractic in Chicago, Illinois. The evidence that adjunct therapy was taught and advocated is clear. Commencing on page 386 it is stated as follows:

"It may be asked, why, if the vertebral subluxations are the primary and predisposing cause of a certain disease, will adjustment of the subluxated vertebrae not of itself cure such a disease? Why, on the other hand, are accessory methods recommended?

"Adjunct measures are used in the treatment of some diseases for the following reasons. (Emphasis added.)

"1. They increase or add to the effectiveness of the spinal adjustment. For example, in chronic constipation, while the restoration of the nerve-supply of the bowel is accomplished by adjustment of the subluxated vertebrae, massage is recommended to assist the bowels in evacuating their contents until their muscular coat has regained its normal tone; correction of the diet is necessary to make the work of the intestines as light as possible during the period when extra demands are being put upon them. Ex-

ercises are valuable in building up the muscular structures of the body and consequently also of the abdominal walls and intestines. During these treatments spinal adjustment is continued, and is the prime factor in the restoration of normal function. The fact that other methods are used in connection therewith does not detract from the merits of the spinal adjustment, since these adjunct measures are merely assistive agents, in any case, in the same manner that drugs are, be it constipation or any other disease.

“2. *Adjunct measures are used for the elimination of contributing causes.* (Emphasis added.) For example, if the patient is suffering from Bright’s disease, the contributing causes must be recognized and attention given them. It is evidently not sufficient in a case of this kind to adjust the tenth to twelfth dorsal vertebrae. This has been done many times, and no results obtained; and yet we know that the nerves emanating from these spinal segments influence the kidneys more than any others. For this reason a careful spinal analysis should be made in all cases to determine the existence of subluxations elsewhere. It would be manifestly folly to permit a patient with Bright’s disease to eat irritating foods, one suffering from heart disease to exercise violently, or one having cirrhosis of the liver to use alcohol. On the other hand, a proper diet should be prescribed, moderate exercises advised, and liquors interdicted in each case respectively.

“3. Nearly all diseases are accompanied by a greater or less toxemia of some kind or nature. It is true that restoration of the functional activity of the secretory and excretory organs through spinal adjustments will ultimately rid the organism of these toxins. *Nevertheless, accessory methods greatly*

assist a more rapid elimination of the toxins and make the spinal adjustment so much more effective. (Emphasis added.) In many acute diseases it is the toxemia which produces dangerous symptoms, and speedy elimination is absolutely necessary. For this reason, adjustment at the tenth dorsal segment which stimulates the kidneys, and at the upper lumbar segments which influence the bowels, is advised in such conditions. In connection therewith hot baths, not enemata, etc., are given to still further increase the eliminative function of the skin and bowels.

“4. Dangerous symptoms may arise at any time in the course of some diseases, and even result in the patient’s death before the cause can possibly be corrected, and the dangers obviated, by spinal adjustment. The temperature in an acute disease, as typhoid fever, may rise to a degree that may menace the life of the patient. This fever is due to an unusually virulent toxemia and immediate steps must be taken, to employ not only spinal adjustments, but eliminative measures, and combine these with methods directed against the fever itself, namely cold baths, sponges, compresses, etc. *Various symptoms must be given appropriate treatment, the above being an example illustrating the necessity for using adjunct measures.* (Emphasis added.)

“5. Other measures of treatment have shown their effectiveness in different diseases, and should therefore be used. *Spinal adjustment is not to be regarded as all in all in the treatment of disease and other measures which are of proven value should be considered. Such measures as massage, hydrotherapy, spinal concussion, elimination, diet, exercises, etc., may be successfully combined with spinal adjustment.* (Emphasis added.) Reasons for the desirability of using some of these adjunct measures have been given

above. These illustrations should serve to show that their use is a rational and logical procedure, yet does not detract in the slightest from the merits of spinal adjustment.

“6. Lastly, there are certain diseases and conditions that are impossible of cure by any known method of treatment and it would therefore be folly to employ spinal adjustment in them. Such diseases as advanced tuberculosis, cancer, etc., are accompanied by such profound destruction of tissue elements that recovery is impossible. Not only the organs primarily affected, but the entire ‘house in which we live’ is falling to pieces, and nothing can replace that which has been destroyed.

“There are other conditions which belong so manifestly in the realm of surgery that attempts to relieve them by spinal adjustment alone are irrational and ill-conceived, and show an ignorance of pathology. Most tumors, for instance, are amenable to no treatment other than excision.”

The above quotations from one of the text books used prior to and during the year 1922 is uncontroverted evidence that the use of adjunct therapy such as massage, hydrotherapy, etc., was taught to the students of the Los Angeles College of Chiropractic and The National School of Chiropractic in Chicago, and advocated by such colleges as part of the chiropractic treatment. It shows further that this treatment and technique basically followed the principle that chiropractic is the maintenance of structural and functional integrity of the nervous system as being the cause of disease and that the practice of chiropractic consists of the use of any and all techniques and means to remove nerve interference at any place in the body including the vertebrae. This evidence is contrary to

the restrictive definition of chiropractic adopted by the United States District Court in its holding that

“Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments.”

VII.

Physiotherapy Is Included in the Scope of Chiropractic Practice and the Ultrasonic Instrument in This Case Is a Therapeutic Device for Use in Physiotherapy Treatment.

Physiotherapy has been defined in the following ways:

The American Illustrated Medical Dictionary, 20th Edition, by Dorland:

“Therapy—physical. The treatment of disease by physical (nonmedical) means, such as heat, massage, hydrotherapy, exercise, rest, occupation therapy, radiation, and electricity.”

Taber's Cyclopedia Medical Dictionary:

“Physical—therapy. The therapeutic use of physical agents other than drugs.

“It comprises the use of physical, chemical and other properties of heat, light, water, electricity, massage, exercise, and radiation.”

Webster's New International Dictionary, Second Edition, Unabridged, with Reference History:

“Physical therapy. Med. The treatment of disease by physical and mechanical means, as by massage, regulated exercise, water, light, heat, electricity, etc”

The 1953 California Legislature defined physio therapy in the Physical Therapy Act (Bus. and Prof. Code,

Secs. 2601 and 2660) effective September 10, 1953, as follows:

“2601. ‘Physical therapy’ means the treatment of any bodily or mental condition of any person by the use of the physical, chemical, and other properties of heat, light, water or electricity, and by massage and active or passive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, and the use of electricity for surgical purposes, including cauterization are not authorized under the term ‘physical therapy’ as used herein.

“2660. The term ‘physical therapy’ shall mean the treatment of any bodily or mental condition of any person by the use of the physical, chemical and other properties of heat, light, water, electricity, massage, and active passive, and resistive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term ‘physical therapy’ as used herein, and a license issued hereunder shall not authorize the diagnosis of disease.”

These definitions find their origin through common usage among all the professions, including the medical, osteopathic, chiropractic and others. The recent statute of the California Legislature regulating physiotherapy, hereinbefore referred to, indicates that the State Legislature considers that physiotherapy methods are available to chiropractors. The statute itself contains an exception with regard to persons authorized to use physiotherapy measures under an initiative act. Section 2665, Deering's California Business and Professions Code, states as follows.

“One year from the effective date of this act, no person not licensed under this chapter shall practice physical therapy in this State for compensation received or expected; provided, however, that this prohibition shall not apply to any of the following:

“(a) Any activities authorized by their licenses on the part of any persons licensed under this code or *any initiative act*. * * *.”

The only initiative measures relating to the practice of the healing arts in this state are the measures dealing with osteopathy and chiropractic. The measure dealing with osteopathy gives the osteopathic physicians the same rights and duties as medical doctors and refers directly to the provisions of the Business and Professions Code which embody the old Medical Practice Act. The Chiropractic Act alone sets up an independent type of practice and undoubtedly is the Act to which the legislature made reference in the Physical Therapy Act.

In the 1955 Report to the California Legislature, made by the Senate Interim Committee on Licensing Business and Professions, published by the Senate of the State of California, March 15, 1955, representatives of the naturopathic profession appeared before the Committee appealing for licensure within the healing arts classification. Their request was denied by the Committee. The Committee, after comparing the educational prerequisites of naturopathy and chiropractic, stated in their report at page 96:

“It would appear, therefore, that a person obtain ing the general basic knowledge required to become a naturopath is simultaneously obtaining the general basic knowledge required to become a chiroprac-

tor and could, therefore, seek to comply with the requirements for entrance to the latter profession.

“Again, the scope of practice of the two groups seems quite similar. Unfortunately, there is no adequate definition of chiropractic now contained in the law but as observed above the courts in the case of *Oosterveen v. Board of Medical Examiners* (112 C. A. 201, 246 P. 2d 136) held that a chiropractor may perform almost every function contained within the general definition of naturopathy. For these reasons, the committee, therefore, feels that the State may be providing a method by which this general school of thought of the healing arts may be practiced under the authority of a license for doctor of chiropractic.”

This expression of the Senate Interim Committee further bears out the attitude of the Legislature regarding the authority of the chiropractic profession under the Act of 1922 to use adjunct therapeutical measures of which physiotherapy is one.

A case in which evidence was presented as to the scope of chiropractic and the use of physiotherapy, was the unreported case of *Percy Purviance v. Charles Brockman* which was tried in the Superior Court of the State of California in and for the County of Amador. This case was tried in 1939 and bears the Superior Court No. 4284. The case involved an action in declaratory relief instituted by the plaintiff under Section 1060 of the Code of Civil Procedure to obtain a declaration of his rights and duties concerning a contract previously entered into by the parties. Both the plaintiff and defendant were licensed chiropractors and the contract provided that plaintiff was to “work in the offices of the defendant under the direc-

tions of the defendant, beginning November 15, 1938, and to treat patients of the defendant and practice chiropractic as taught in chiropractic schools and colleges, and also to use all necessary mechanical, hygienic and sanitary measures incident to the care of the body, and shall include hydrotherapy, electrotherapy, light, heat, hot and cold packs, diet, massage, enemas, together with anatomical and manual manipulations, on patients of the defendant. Defendant subsequently refused to permit plaintiff to do the things enumerated in the contract upon the ground that it might be held that such services and practice did not come within the rights or powers of one holding a license as a chiropractor, and that by becoming a party to such acts, defendant might expose himself to prosecution. The court held the contract valid in this case stating that the evidence showed that hydrotherapy, electrotherapy, light, heat, hot and cold packs, diet, massage, enemas, together with anatomical and manual manipulations, were taught as chiropractic in chiropractic schools and colleges. The court also held that:

“The Chiropractic Act also provides that in addition to the practice of chiropractic as taught in chiropractic schools and colleges that the license authorizes the holder ‘and, to use all necessary mechanical and hygienic and sanitary measures incident to the care of the body’ but shall not authorize the practice of medicine.

“To show that these things mentioned in the contract, namely: hydrotherapy, electrotherapy, light, heat, hot and cold packs, diet, massage, enemas, together with anatomical and manual manipulations, are not the practice of medicine under the Medical Practice Act which is now found in the Business and Professions Code of California in Section 2138, ‘The

drugless practitioners certificate authorizes the holder to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medical preparations and without in any manner severing or penetrating any of the tissues of human being except the severing of the umbilical cord.' 'It also authorizes the general and local application or use of any and all manipulative, electro-therapeutical, hydro-therapeutical, dietary and psychological methods of treating the sick or afflicted, including physiotherapy, physical therapy, colonic therapy.'

"It is manifestly evident if these things mentioned in the Drugless Practitioner's Certificate are not the practice of medicine under the Medical Act, then they are not the practice of medicine under the Chiropractic Act." (Emphasis added.)

"In the case of *People v. La Barre*, 193 Cal. 388, the Supreme Court said relative to the Chiropractic Act: 'The initiative was intended to accomplish the same object that all general health laws are designed to accomplish and is *in pari materia* with all other acts regulating the same general subject.'

"The Medical Law does not provide for the teaching of physical therapy, and the curricula of the State University Medical College has no course provided in it; and the same can be said of Stanford University Medical School and as chiropractic colleges do teach physiotherapy then it belongs to the chiropractors as a prior arts right.

"And Section 18 of the Chiropractic Act provides: 'Nothing herein shall be construed as repealing the Medical Practice Act of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendment may conflict with the provisions of this act as applied to persons licensed under

this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.' The use of the things mentioned in the contract are not the practice of medicine and are permitted to the use of the chiropractor under the scope of a chiropractic license."

The above decision cannot be reconciled with the holdings in the cases of *People v. Fowler (infra)*, and *People v. Mangiagli (infra)*. The case however, was not a criminal matter and the court had an opportunity to consider the scope of chiropractic as the primary issue involved.

In the case of *Oosterveen v. Board of Medical Examiners* (1952), 112 Cal. App. 2d 201, 246 P. 2d 136, referred to in the Committee Report previously referred to, the appellants were graduate naturopaths and chiropractors, not licensed to practice in the State of California. The practice of naturopathy in the state of California without being licensed in one of the healing arts is a violation of the Business and Professions Code, Section 2141.

There is no provision in California State law for the issuance of a license to practice naturopathy since the repeal of the Drugless Practitioners Act in 1949. The trial court defined naturopathy as follows:

"That Naturopathy is a mode of healing that attempts to restore and maintain health by the use of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, and does not advocate the use of drugs and medicines but does advocate the use of 'dietary supplements' which said dietary supplements include all substances found in nature, including those substances found in herbs, the earth and animal tissues,

whether raw or refined, and it does not include the use of surgery or the penetration of the tissues;
. . .”

The defendant Board of Medical Examiners agreed with the conclusion of the trial court: “*That the methods of naturopaths may be employed by licensed chiropractors* . . .” The court quoted on page 106 as follows:

“It is of common knowledge that nature is the indispensable healing agency and that practitioners of medicine and surgery, osteopathy and chiropractic make use of the curative qualities of light, air, water, rest, diet and physical and mental culture in connection with the agencies peculiar to their several systems of healing.”

The court further stated:

“Plaintiffs, being unlicensed, may not, under the present law, practice at all. Even if they should become licensed as physicians and surgeons or chiropractors, they could not practice naturopathy in its true sense, inasmuch as they could not use the title ‘Naturopath’ or ‘N.D.’ nor hold themselves out as such. But they must become licensed either as physicians and surgeons (which now includes osteopaths) or as chiropractors in order to employ their methods.”

The decision of the court in this case was the primary reason that the legislative committee investigating the advisability of having separate licenses for Naturapaths reported that this was unnecessary because chiropractors and others could perform almost every function contained within the definition of Naturopathy. The court in deciding that chiropractors could perform the functions of a Naturopath necessarily rejected the proposition that the scope of chiropractic is limited to spinal adjustment as advocated by the Palmer school of chiropractic.

VIII.

The Ultrasonic Instrument Is a Therapeutic Instrument for Use in Physiotherapy Treatment.

The ultrasonic device was designed mainly for use by practicing physiotherapists, chiropractors, osteopaths, and physicians in conjunction with other forms of treatment. The device is calibrated to put out one half of a watt per square centimeter of the transducer head which is not harmful in the hands of persons authorized by law to use it. The physician normally uses an output of energy from 3 to 6 watts per square centimeter of the transducer head. The instrument is used in the treatment of two diseases, bursitis and osteoarthritis. It was conceived and manufactured as a physiotherapy device which, in effect, accomplishes a deep massage and is therefore valuable for use as a physiotherapy instrument together with the treatment of the two diseases mentioned above. The massage is accomplished by the application of high frequency sound waves producing rapidly alternating compressions and rarifications within the tissues. When such therapy is applied to the surface of the body therapeutically, the sound waves penetrate and relieve congestion in tissues beneath the surface. As an adjunct therapy instrument it is used to speed up removal of nerve interference, and ameliorate severe reactions reducing muscle spasm and relieving pain. It has had considerable use by athletic organizations for the treatment of ailments such as set forth above.

IX.

The Law Governing Chiropractic Is a Creature of State Statute and Its Scope Should Be Determined Strictly in Accordance With the Law of the Particular State Involved.

The California decisions dealing with the scope of chiropractic indicate that the courts did not have presented the evidence that is available in this case. Possibly the reason is that most of the cases were criminal in nature and hence the prime issue has never been the true scope of chiropractic but rather the guilt or innocence of the defendant. In most instances the defendant was a chiropractor who advocated the scope of his chiropractic license as a defense without introducing sufficient evidence to show the court what the scope of chiropractic was meant to be under the Initiative Act of 1922. The courts have commented upon deciding the scope of chiropractic in the absence of such evidence. See *Evans v. McGranaghan* (1935), 4 Cal. App. 2d 202, 41 P. 2d 937, and *In re Hartman* (1935), 10 Cal. App. 2d 213, 51 P. 2d 1104.

One such case was the case of *People v. Fowler*, 32 Cal. App. 2d Supp. 737, 84 P. 2d 326, 330-331 (App. Dept., Superior Ct., L. A. County, 1938). This was a criminal case in which the defendant was charged with violating Section 2141 of the Business and Professions Code. Defendant was charged with practicing "a system and mode of treating the sick and afflicted", and "diagnosed, treated, operated for and prescribed for an ailment, blemish, deformity, disease, disfigurement, disorder, injury and other mental and physical condition" of a named person, without having a valid unrevoked certificate authorizing him to do so, issued by the board of medical

examiners or the board of osteopathic examiners. The defendant was a duly licensed chiropractor and he contended that what he did was authorized by his chiropractic license. The defendant alleged that by reason of the provisions of the Chiropractic Act (enacted in 1922 as an initiative measure; Stats. 1923, Deering's Gen. Laws, 1937 Ed., Act 4811) the complaint must, in order to charge a public offense, negative the possession by the defendant of a license issued under that act by the board of chiropractic examiners, or else allege that the acts done were not such as could lawfully be done under such a license. The court held the complaint to be sufficient thereby upholding the action of the trial court (Municipal). Commencing on page 745 the court ran the gauntlet of definitions of chiropractic citing certain dictionaries and decisions from other jurisdictions. All of the definitions used in the decision restricted chiropractors to adjustment of the spine by hand. For example, the court cites the Standard Dictionary, 1913 edition, defining chiropractic as "A drugless method of treating disease *chiefly* by manipulation of the spinal column." On page 746 the court refers to other definitions, two of which are as follows:

"A system of therapeutic treatment for various diseases, through the adjusting of articulations of the human body, particularly those of the spine, with the object of relieving pressure or tension upon nerve filaments. The operations are performed with the hands, no drugs being administered (taken from Nelson's Encyclopedia), and a system of manipulations which aims to cure disease by the mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation (from International Encyclopedia)."

Some of these definitions of chiropractors are not contrary to the position taken by the Appellant in this appeal. For example appellant does not dispute the definition of chiropractic which states that it is a drugless method treating disease *chiefly* by manipulation of the spinal column. The conclusion that chiropractic is limited strictly to manipulation of the spinal column by hand is however disputed. An examination of the laws of other states reveals such a wide variance in defining the scope of chiropractic that it becomes necessary to examine the scope strictly in accordance with the definition of the particular state involved.

Examples of this wide variance can be seen by referring to definitions of chiropractic used by some of the other states.

The Arizona law provides

“licensee may adjust by hand any articulations of the spinal column but may not prescribe for or administer any medicine or drugs, practice major or minor surgery obstetrics, or any other branch of medicine, or practice osteopathy.”

Secs. 67-704 A. C. A., 1939.

In New Mexico the scope of chiropractic is defined as follows:

“. . . Said license, when granted by said Board of Chiropractic Examiners, shall entitle the holder thereof to diagnose and treat diseases, injuries, deformities or other physical or mental conditions, by the use of any or all methods as herein provided, such as palpating, diagnosing, adjusting and treating diseases, injuries and defects of human beings by the application of manipulative manual and mechanical means, including all natural agencies imbued with the healing act, such as food, water, heat, cold, electricity,

vacuum cupping and drugless appliances, without the use of drugs or what are commonly known as medicinal preparations, or in any manner severing or penetrating any of the tissues of the human body, known as surgery; . . .”

New Mexico Statutes, 1953 Ann., Chap. 67, Art. 3, Sec. 67, pp. 3-4.

The Idaho law defines the practice of chiropractic as follows:

“54-712. Practice of chiropractic defined.—Any licentiate under this chapter may adjust any displaced segment of the vertebral column or any displaced tissue of any kind or nature, for the purpose of removing occlusion of nerve stimulus in the bodies of human beings, and practice physiotherapy, electrotherapy, hydrotherapy, as taught in chiropractic schools and colleges, but nothing herein contained shall allow any licentiate to prescribe medicine, perform surgical operations or practice obstetrics.”

Idaho Code, Secs. 54-712.

The State of Nevada defines chiropractic as follows:

“Chiropractic is defined to be the science, art and practice of palpating and adjusting the articulations of the human body by hand, the use of physiotherapy, hygienic, nutritive and sanitary measures and all methods of diagnosis; provided, however, that in such diagnosis no piercing or severing of body tissues shall be permitted, save and except for the drawing of blood for diagnostic purposes only. Nothing in this act shall be construed to permit a chiropractor to practice medicine, surgery, obstetrics, osteopathy, dentistry, optometry or chiropody.”

Nevada Compiled Laws, Sec. 1084.

In the State of Ohio certificates are issued for each of the limited branches listed in the Ohio law. This is set forth as

"Sec. 4731.15 (1274.1). Examination and registration of practitioners of limited branches of medicine or surgery.

"The state medical board shall also examine and register persons desiring to practice any limited branch of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall include chiropractic, naprapathy, spondylotherapy, mechanotherapy, neuropathy, electrotherapy, hydrotherapy, suggestive therapy, psychotherapy, magnetic healing, chiropody, Swedish movements, massage, and some other branches of medicine or surgery as the same are defined in section 4731.34 of the Revised Code, except midwifery and osteopathy."

Ohio Revised Code, Tit. 47, Chap. 4731, Sec. 4731.15.

An examination of these various state statutes demonstrates the futility of relying upon a general definition of chiropractic to decide its scope in any one state. Such scope is strictly a creature of statute and the drastic differences in state laws reveal that what is chiropractic in one state may not be chiropractic in another.

These differences were overlooked in the Fowler decision and the court after reciting the definitions from various states together with general definitions found in dictionaries and encyclopedias concluded as stated on page 746 of the decision that "this general consensus of definitions, current at and before the time of the Chiropractic

Act was adopted, shows what was meant by the term 'Chiropractic' when used in that Act."

The unfortunate part of this holding is that other California courts adopted the same conclusion in similar cases. (See *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935; *United States of America v. 22 Devices, etc.*, 98 Fed. Supp. 914.) This decision by definition is further unfortunate because more care could have been used in the definitions adopted. For example—on page 746 of the *Fowler* decision a definition of chiropractic is referred to from Nelson's Encyclopedia as follows: "The operations are performed with the hands, no drugs being administered." Compare this with a more complete definition from Thomas Nelson & Sons Encyclopedia, copyrighted in 1905, revised in 1935:

"CHIROPRACTIC is the science of restoring health by locating and correcting interference with transmission and expression without the use of drugs or surgery. The practice of chiropractic is based upon the premise that normal function results from normal delivery of nerve impulses to all organs and tissues and that disease results from the interference with such delivery. The chiropractic premise holds that all vital organs are supplied with two sets of nerves. One of these conveys activated nervous impulses while the other conveys inhibiting nerve impulses to each organ. Any imbalance which results from interference with transmission in either of these sets of nerves leads to functional imbalance, thus resulting in either increased or decreased function. The chiropractor contends that this functional imbalance may, if continued, lead to pathology in the organ or organs involved.

"The chiropractor diagnoses his cases, employing the usual and accepted diagnostic procedure. This

he does for the purpose of learning which organs or parts of the body are affected. With his knowledge of the nervous system he knows the paths followed by the nerves supplying the organs involved and through his manipulative methods he proceeds to correct such interference.

“The chiropractor works chiefly on the spine and its immediately adjacent tissues for the purpose of relieving any pressure or tension on nervous fibers which exist between the vertebrae. *However, he holds that every procedure which serves to locate and correct nerve interference is proper chiropractic procedure.* (Emphasis added.) He contends that when this is done, normal function is restored and when this takes place the disease which has resulted will automatically be eliminated through the natural healing powers within the body. The chiropractor holds that this theory concerning the importance of inhibiting and activating nerve fibers in the maintenance of normal function is in harmony with the facts of physiology which have been definitely proved by scientists in no way connected with the chiropractic profession.

“This system of healing was instituted in 1895 by Daniel D. Palmer, who first began to teach his doctrines and knowledge of body mechanics in Davenport, Iowa.

“Consult:

B. J. Palmer, ‘The Science of Chiropractic’ (1917).

J. M. Loban ‘Technic and Practice of Chiropractic’ (1920).

J. S. Riley, ‘Science and Practice of Chiropractic’ (1920).”

The *Fowler* case was relied upon in the later case of *United States of America v. 22 Devices*, more or less, labeled in part "Halox Therapeutic Generator", 98 Fed. Supp. 914. The court in that case states as follows:

"The scope of this authority has not been defined by the Supreme Court of California, but other appellate courts of the state have had occasion to consider the question. In *People v. Fowler*, 32 Cal. App. Supp. 737, 84 P. 2d 326, the court first considered the meaning of the authorization 'to practice chiropractic . . . as taught in chiropractic schools or colleges.' The court held that this section authorized licensees to practice chiropractic as taught in chiropractic schools or colleges at the time of the enactment of the Chiropractic Law. The court observed that the term 'chiropractic' had a well-established and quite definite meaning when the statute was enacted, that is, that chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the curing of disease."

The question was presented in this case as to whether or not a chiropractor which used such devices could be classed as a physician within the meaning of the regulations which provide that the Halox device did not require labeling for use. The court in that case held that a chiropractor was not included in the term physician as set forth in the regulations and therefore the device was not exempt from labeling. The distinction between the "*Halox Case*" and the case before the court is obvious. The claimant's position in the "*Halox Case*" was that the devices were mechanical and came within the exemption of

the Food and Drug Act because Section 7 of the Chiropractic Act authorized chiropractors "to use mechanical . . . measures incident to the care of the body." The court held that the Halox Generator was not within the term "mechanical" as it is used in Section 7 of the Chiropractic Act. This case involved the inhalation of chlorine gas which is obviously at great variance with any definition of physiotherapy. The machine's only function was generating chlorine gas and as such it had no therapeutic use or function. The generators bore no directions for use and the claimant rested his case on the proposition that the devices were exempt from this requirement by virtue of the exemption regulations.

It appears quite clear that in the "*Halox Case*", although it was asserted the device was mechanical, its action was purely chemical.

In the case of *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, 218 P. 2d 1025, the defendant was a chiropractor prosecuted for violations of the provisions of the Business and Professions Code regarding medical practice (Div. 2, Chap. 5). Objection was made to the complaint on the grounds that it was too vague and uncertain. The complaint was in the words of the statute describing the offense (Bus. and Prof. Code, Sec. 2141) and the court held that the complaint must be regarded as sufficient. The court stated on page 938 that "the legal problems presented here are substantially identical with those considered in *People v. Fowler* (1938),

32 Cal. App. 2d Supp. 737". The court stated at the bottom of page 938:

"Considerable time was consumed at the trial by the introduction of evidence by defendant to show that what he did is now taught in chiropractic schools and colleges. This matter was discussed in the Fowler case, *supra*, where we held that section 7 authorized, by the provision, numbered as (1) above, nothing that was not chiropractic, as that term was understood in 1922, when the act was passed, and that the term was then defined as 'A system of (or) the practice of adjusting the joints, especially of the spine, by hand for the curing of disease' (32 Cal. App. 2d Supp. 745-6). We further said, regarding chiropractic schools: 'The effect of the words "as taught in chiropractic schools or colleges" is not to set at large the signification of "chiropractic," leaving the schools and colleges to fix upon it any meaning they choose. Were the word "chiropractic" of unknown, ambiguous or doubtful meaning, this clause, "as taught" etc., might serve to provide a means of defining or fixing its signification, but there is here no such lack of clarity. The scope of chiropractic being well known, the schools and colleges, so far as the authorization of the chiropractor's license is concerned, must stay within its boundaries; they cannot exceed or enlarge them. The matter left to them in merely the ascertainment and selection of such among the possible modes of doing what is comprehended within that term as may seem to them best and most desirable, and so the fixing of the standards of action in that respect to be followed by chiropractic licensees.' "

X.

Chiropractic Is Not a Stationary Science the Scope of Which Cannot Be Expanded by Scientific Developments as Contended by the Appellee.

It is submitted that the Chiropractic Act of 1922, did not place upon the chiropractors a static profession. The practice of chiropractic is ever progressing and the Act contemplated the use by chiropractors of advancements, knowledge and new developments in the fields taught by chiropractic schools and colleges without limitation. The State Board of Chiropractic Examiners has authority, which it has exercised, to increase standards and educational requirements to cover new developments in the various subjects of chiropractic, including physiotherapy. It is submitted that there is no rule of law or limitation requiring that physiotherapy or any other subject be taught the same way today as it was taught in 1922, or that chiropractors may not take advantage of new developments and advancements made in their field. It is asserted that since ultrasonics was not specifically taught in schools and colleges as of 1922 that such teachings are barred forever and further that ultrasonics cannot therefore be included within the scope of the chiropractic license. Ultrasonics, at least in this country, was comparatively unknown in 1922 and therefore could not have been taught in schools and colleges. Indeed there are many devices being used by chiropractors today which were unknown at that time but their useage is the results of developments within the field of the subjects taught in schools

and colleges at the time of the adoption of the Chiropractic Act in 1922.

In 1947 (Stat., 1947, Chap. 151) the additional requirements for licensure were increased to 4,000 hours from 2,400 hours and the curriculum presently parallels that of the grade A medical college. These requirements are as follows:

Chiropractic Act. License to Practice; Fee; Educational Requirements.

“Sec. 5. It shall be unlawful for any person to practice chiropractic in this State without a license so to do. Any person wishing to practice chiropractic in this State shall make application to the board 15 days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars (\$25) and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an approved chiropractic school or college which teaches a course of not less than 4,000 hours, extended over a period of four school terms of at least nine months each, and shall present to the board at the time of making such application a diploma from a high school, or proof, satisfactory to the board, of education equivalent in training power to a high school course.

“The schedule of minimum educational requirements to enable any person to practice chiropractic in this State is as follows, except as herein otherwise provided:

Group 1	
Anatomy, including embryology and histology	18 to 20%
Group 2	
Physiology	6 to 8%
Group 3	
Biochemistry, inorganic and organic chemistry	6 to 8%
Group 4	
Pathology and bacteriology	10 to 12%
Group 5	
Public health, hygiene and sanitation	3 to 4%
Group 6	
Diagnosis, pediatrics, dermatology, syphilology and psychiatry	12 to 18%
Group 7	
Obstetrics and gynecology	3 to 4%
Group 8	
Principles and practice of chiropractic, physiotherapy and office procedure	25 to 28%
Total	83 to 100%
Electives	17 to 0%”

The increased educational requirements of 1944 were subsequently challenged in the courts. When presented to the District Court of Appeal (hearing in the Supreme Court being subsequently denied) the court took cognizance of changes and changed conditions affecting the use and application of therapeutic methods. In the case of

Hunt v. Board of Chiropractic Examiners, 87 Cal. App. 2d 98, 196 P. 2d 77, the court states:

“The statute prescribes a schedule of ‘minimum’ educational requirements prerequisite to examination for license to practice covering 2400 academic hours. This was enacted in 1922. The appellate board, in 1944, by rule increased the required number of academic hours to 4000. It is hardly necessary to allude to the great number of changes and improvements that have been made in the healing arts during this period of twenty-two years. It can not be argued that the appellate board acted arbitrarily or unreasonably in demanding this additional education. *To the contrary, it would be more reasonable to say that it would have been deficient in its duties as an agency concerned with the public health if it had neglected to so act.*

“(4, 5) it is a fair and reasonable interpretation of the statute that it was intended to permit the board to take cognizance of these conditions so as to provide more efficient treatment of the sick, and that it was with such purpose in view that the statute fixed the ‘minimum’ requirements and gave to the board the power to enact rules ‘proper and necessary for the performance of its work.’ If this is not a proper interpretation of the statute, then we can see no reason for the use of the word ‘minimum’ in section 5. Respondents’ argument that the statute was enacted to relieve the chiropractors from the unreasonable control of the medical board does not explain the use of the word ‘minimum.’ If the purpose was to fix a schedule of educational requirements which no board or agency could exceed then the proper word would have been ‘maximum’. But in fixing a ‘minimum’ schedule the meaning expressed in the clear language of the statute is that ‘at least’ such hours of instruc-

tion were required and thus it was left open to the board to require additional instruction either in the same subjects of study specified in the statute or in new or additional subjects as the board might determine. For these reasons the judgments in the four causes which were based on the additional educational requirements cannot be sustained.” (Emphasis supplied.)

The Attorney General of the State of California, in Attorney General’s Opinion 48/292, stated as follows:

“The State has the right to specify and lay out a course of study and establish a standard of efficiency. (People v. Radledge, 172 Cal. 401, at 406.) The same reasons which control imposing conditions upon the compliance with which one engaged in the healing arts is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more accurate knowledge is acquired of the human system of the agencies by which it is effected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice. (Dent v. West Virginia.) Regulatory laws may be made operative on those engaged in the practice prior to the enactment of the laws and the state may change the qualifications from time to time, making them more rigid. Legislation prescribing qualifications which a practitioner cannot meet because of conditions antedating the enactment of the legislation is valid. (Butcher v. Maybury, 8 Fed. 2d 155, 159.) When once issued, there is a right in a license which will be protected by the courts from improper or arbitrary action by the licensing board. (Randall v. Board of Medical Examiners, 110 Cal. App. 61.)”

XI.

Section 7 of the Chiropractic Act Authorizing Chiropractors “to Use All Necessary Mechanical, and Hygienic and Sanitary Measures Incident to the Care of the Body” Is an Addition to the Scope of Chiropractic.

The second part of Section 7 of the Chiropractic Act contains the authorization “to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body.” In *People v. Fowler, supra*, the court held that this phrase “is not a definition of, but an addition to, chiropractic as used in the previous part of section 7 and authorizes chiropractors to use measures which would not otherwise be within the scope of their licenses.” (See also *U. S. v. Halox Therapeutic Generator etc., supra*.) There appears to be no disagreement by the California courts that this part of Section 7 is an addition to the scope of chiropractic as defined therein. There seems to be little doubt that this was so intended under the Act since certain other acts, such as the Naturopathic Statute and the Drugless Practitioners Act were repealed by the adoption of the Chiropractic Act.

There is no question but what the drugless practitioners of 1922 could and did practice physiotherapy. Section 2231 of the California Business and Professions Code (now repealed) provided a course of study necessary to obtain a drugless practitioner’s certificate which included 500 hours of manipulative and mechanical therapy.

It is submitted that this portion of Section 7 of the Chiropractic Act is inconsistent with the holding of the District Court that “chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments.”

XII.

To Determine the Scope of Chiropractic in the State of California the Entire Chiropractic Act of 1922 Should Be Determined.

The decisions of this State which have discussed the scope of chiropractic have invariably been limited to an examination and consideration of Section 7 of the Chiropractic Act. It is submitted that Section 7 should be considered along with other provisions of the Chiropractic Act an examination of which is valuable in determining what was intended with respect to the scope of chiropractic.

Section 5 of the act sets forth a schedule of minimum educational requirements to enable any person to practice chiropractic in this state. It should be noted that Group 8 of Section 5 provides as one of the educational requirements as follows: "Principles and practices of chiropractic, physiotherapy, and office procedure."

Section 6(c) of the Act provides for written examinations for each of the subjects set forth in Section 5 to ascertain the fitness of an applicant to *practice chiropractic* (emphasis added).

Section 13 of the Act requires chiropractic licentiates to observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health, and shall sign death certificates and make reports as required by law to the proper authorities, and such reports shall be accepted by the officers of the departments to which the same are made.

Section 16 of the Act provides that there shall be nothing in the Act to prohibit service in the case of emergency and

“nor shall this Act be construed so as to discriminate against any particular school of chiropractic . . .”

Section 18 provides for the repeal of any other act which is in conflict with the Chiropractic Act.

It is submitted that when Section 7 is examined in the light of the whole Chiropractic Act the authority of the chiropractor by virtue of his license is considerably more broad than the definition adopted by the District Court to the effect that “chiropractic is a system for the practice of adjusting the joints, especially at the spine, by the hand for the treatment of disease and ailments.” The chiropractor’s duty under the Act to observe all state and municipal regulations relating to all matters pertaining to the public health; to sign death certificates and make reports to the proper authorities, and to provide service in cases of emergency, provides a basis for concluding that chiropractic embraces a philosophy of healing which the people intended to establish as a coordinate along with medicine, surgery and osteopathy.

Section 6(c) of the Act has not been amended since the adoption of the Chiropractic Act in 1922. It provides in effect, as stated before, for written examinations in all of the subjects set forth in Section 5 to ascertain *fitness of an applicant to practice chiropractic* (emphasis added). This of itself shows that the intent of the Act was to include within the scope of the chiropractic practice all of the matters set forth in Section 5 relating to the minimum educational requirements.

The course of study as provided by statute is quite similar for medicine, osteopathy and chiropractic. It would seem a fair inference that the people intended by their initiative act to parallel the chiropractic profession with

these other professions up to the point that chiropractors are not authorized to practice medicine, surgery, or osteopathy nor use any drug or medicine included *in materia medica*. The Chiropractic Act itself contains proper safeguards against any attempt to enlarge the practice of chiropractic to interfere with these other fields.

Conclusion.

It is respectfully submitted that the Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices under Seizure be granted. The scope of the practice of chiropractic is not limited to the adjustment of the spine by hand but includes the use of drugless adjunct therapy and that physiotherapy is such an adjunct therapy.

It is further submitted that the devices in question are intended for use in the field of physiotherapy and that such devices come within the exception to the labeling provisions of the Federal Food, Drug, and Cosmetic Act as contained in 21 C. F. R. 1.106(3).

Respectfully submitted,

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APPENDIX.

Chiropractic Initiative Act of 1922.

“Section 1. A board is hereby created to be known as the ‘state board of chiropractic examiners,’ hereinafter referred to as the board, which shall consist of five members, citizens of the State of California, appointed by the governor. Each member must have pursued a resident course in a regularly incorporated chiropractic school or college, and must be a graduate thereof and hold a diploma therefrom.

“Each member of the board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder. No two persons shall serve simultaneously as members of said board, whose first diplomas were issued by the same school or college of chiropractic, nor shall more than two members be residents of any one county of the state. And no person connected with any chiropractic school or college shall be eligible to appointment as a member of the board. Each member of the board, except the secretary, shall receive a per diem of ten dollars for each day during which he is actually engaged in the discharge of his duties, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, such per diem traveling expenses and other incidental expenses of the board or of its members to be paid out of the funds of the board hereinafter defined and not from the state’s taxes.”

“Sec. 2. Within sixty days of the date upon which this act takes effect, the governor shall appoint the mem-

bers of the board. Of the members first appointed, one shall be appointed for a term of one year, two for two years, and two for three years. Thereafter, each appointment shall be for the term of three years, except that an appointment to fill a vacancy shall be for the unexpired term only. Each member shall serve until his successor has been appointed and qualified. The governor may remove a member from the board after receiving sufficient proof of the inability or misconduct of said member.”

“Sec. 3. The board shall convene within thirty days after the appointment of its members, and shall organize by the election of a president, vice-president and secretary, all to be chosen from the members of the board. Thereafter elections of officers shall occur annually at the January meeting of the board. A majority of the board shall constitute a quorum.

“It shall require the affirmative vote of three members of said board to carry any motion or resolution, to adopt any rule, or to authorize the issuance of any license provided for in this act. The secretary shall receive a salary to be fixed by the board in an amount not exceeding one thousand dollars per annum, but not per diem, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, and shall give bond to the state in such sum with such sureties as the board may deem proper. He shall keep a record of the proceedings of the board, which shall at all times during business hours be open to the public for inspection. He shall keep a true and accurate account of all funds received and of all expenditures incurred or authorized by the board, and on the first day of December of each year he

shall file with the governor a report of all receipts and disbursements and of the proceedings of the board for the preceding fiscal year.”

“Sec. 4. The board shall have power:

(a) To adopt a seal, which shall be affixed to all licenses issued by the board.

(b) To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, copies of such rules and regulations to be filed with the secretary of state for public inspection.

(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed.”

“Sec. 5. It shall be unlawful for any person to practice chiropractic in this state without a license so to do. Any person wishing to practice chiropractic in this state shall make application to the board fifteen days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an incorporated chiropractic school or college which teaches a course of not less than two thousand four hundred hours, extended over a period of three school terms

of at least six months each, and must give satisfactory proof of having attended not less than ninety per cent of said two thousand four hundred hours, and shall present to the board at the time of making such application, a diploma from a high school, or proof, satisfactory to the board of education equivalent in training power to a high school course.

The schedule of minimum educational requirements to enable any person to practice chiropractic in this state is as follows, to wit, except as herein otherwise provided:

Anatomy	600 hours
Histology	100 hours
Elementary chemistry and toxicology.....	100 hours
Physiology	200 hours
Bacteriology	100 hours
Hygiene and sanitation.....	100 hours
Pathology	400 hours
Diagnosis or analysis	400 hours
Chiropractic theory and practice.....	500 hours
Obstetrics and gynecology.....	100 hours
<hr/>	
Total	2400 hours"

"Sec. 6. (a) The board shall meet as a board of examiners on the first Tuesday following the second Monday of January and July of each year, and at such other times and places as may be found necessary for the performance of their duties. The office of the board shall be in the city of Sacramento. Sub-offices may be established in Los Angeles and San Francisco, and such records as may be necessary may be transferred temporarily to such sub-offices. Legal proceedings against the board may be instituted in any one of said three cities.

“(b) Each applicant shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded.

“(c) All examinations shall be in writing, except in cases herein otherwise prescribed, and shall be practical in character, as taught in chiropractic schools or colleges, and designed to ascertain the fitness of the applicant to practice chiropractic. Said examinations shall be in each of the subjects as set forth in section five hereof. A license shall be granted to any applicant who shall make a general average of seventy-five per cent, and not fall below sixty per cent in more than two subjects or branches of said examination. Any applicant failing to make the required grade shall be given credit for the branches passed, and may, without further cost, take the examination at the next regular examination on the subjects in which he failed. For each year of actual practice since graduation the applicant shall be given a credit of one per cent on the general average.”

“Sec. 7. One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated ‘License to practice chiropractic,’ which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included *in materia medica*.”

“Sec. 8. Any person who shall have practiced chiropractic for two years after graduation from a chiropractic school or college, one year of which shall have been in this

state preceding the date upon which this act takes effect, or any person who graduated from a chiropractic school or college prior to January 1, 1922, and who shall present to the board satisfactory proof of good moral character and having pursued a resident course of not less than two thousand hours in a legally incorporated chiropractic school or college, shall be given a practical and clinical examination in chiropractic philosophy and practice, and if he, or she, make a grade of seventy-five per cent in such examination, the board shall grant a license to said applicant to practice chiropractic in this state under the provisions of this act; provided, however, that application for said license is made within six months of the date upon which this act takes effect and that each applicant shall pay to the secretary of the board the sum of twenty-five dollars."

"Sec. 9. Notwithstanding any provision contained in any other section of this act the board, upon receipt of the fee of twenty-five dollars, shall issue a license to any of the following named persons:

(a) To each member of the board.

(b) To any person licensed to practice chiropractic under the laws of another state, having the same general requirements as prescribed in this act; and provided, further, that such other state in like manner grants reciprocal registration to chiropractic practitioners of this state."

"Sec. 10. (a) The board shall refuse to grant, or may revoke, a license to practice chiropractic in this state, or may cause a licensee's name to be removed from all records of licensed practitioners of chiropractic in this state, upon any of the following grounds, to wit:

“The employment of fraud or deception in applying for a license or in passing an examination as provided in this act; the practice of chiropractic under a false or assumed name; or the personation of another practitioner of like or different name; the conviction of a crime involving moral turpitude; habitual intemperance in the use of ardent spirits, narcotics or stimulants to such an extent as to incapacitate him for the performance of his professional duties; the advertising of any means whereby the monthly periods of women can be regulated or the menses reestablished if suppressed; or the advertising, directly, indirectly or in substance, upon any card, sign, newspaper advertisement, or other written or printed sign or advertisement, that the holder of such license or any other person, company or association by which he or she is employed, or in whose service he or she is employed, or in whose service he or she is, will treat, cure, or attempt to treat or cure, any venereal disease, or will treat or cure, or attempt to treat or cure, any person afflicted with any sexual disease, for lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs, or being employed by, or being in the service of any person, company or association so advertising. Any person who is licentiate, or who is an applicant for a license to practice chiropractic, against whom any of the foregoing grounds for revoking or refusing a license is presented to the board with a view of having the board revoke or refuse to grant a license, shall be furnished with a copy of the complaint, and shall have a hearing before the board in person or by an attorney, and witnesses may be examined by the board respecting the guilt or innocence of the accused. The secretary on all cases of revocation shall enter on his register the fact of such revocation, and shall certify the

fact of such revocation under the seal of the board to the county clerk of the counties in which the certificates of the person whose certificate has been revoked is recorded; and said clerk must thereupon write upon the margin or across the face of his register of the certificate of such person the following: 'This certificate was revoked on the day of, ' giving the day, month and year of such revocation in accordance with said certification to him by said secretary. The record of such revocation so made by said county clerk shall be *prima facie* made evidence of the fact thereof, and of the regularity of all proceedings of said board in the matter of said revocation.

“(b) At any time after two years following the revocation or cancellation of a license or registration under this section, the board may, by a majority vote, reissue said license to the person affected, restoring him to, or conferring on him all the rights and privileges granted by his original license or certificate. Any person to whom such rights have been restored shall pay to the secretary the sum of twenty-five dollars upon the issuance of a new license.

“Sec. 11. (a) Every person who shall receive a license from the board shall have it recorded in the office of the county clerk of the county in which he resides, and shall have it likewise recorded in the counties into which he shall subsequently move for the purpose of practicing chiropractic.

“(b) The failure or the refusal on the part of the holder of a license to have it recorded before he shall begin to practice chiropractic in this state, after having been notified by the board to do so, shall be sufficient

ground to revoke or cancel a license and to render it null and void.

“(c) The county clerk of each county in this state shall keep for public inspection, in a book provided for that purpose, a complete list and description of the licenses recorded by him. When any such license shall be presented to him for record he shall stamp upon the face thereof his signed memorandum of the date when such license was presented for record.

“Sec. 12. Each person practicing chiropractic within this state shall, on or before the first day of January of each year, after a license is issued to him as herein provided, pay to said board of chiropractic examiner a renewal fee of two dollars. The secretary shall, on or before November first of each year, mail to all licensed chiropractors in this state a notice that the renewal fee will be due on or before the first day of January next following. Nothing in this act shall be construed to require the receipts to be recorded in like manner as original licenses. The failure, neglect or refusal of any person holding a license or certificate to practice under this act in the State of California to pay said annual fee of two dollars during the time his or her license remains in force shall, after a period of sixty days from the first day of January of each year, *ipso facto*, work a forfeiture of his or her license or certificate, and it shall not be restored except upon the written application therefor and the payment to the said board of a fee of ten dollars, except that such licentiate who fails, refuses or neglects to pay such annual tax within a period of sixty days after the first day of January of each year shall not be required to submit to an examination for the reissuance of such certificate.

“Sec. 13. Chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health, and shall sign death certificates and make reports as required by law to the proper authorities, and such reports shall be accepted by the officers of the departments to which the same are made.

“Sec. 14. All moneys received by the board under this act shall be paid to the secretary of said board, who shall give a receipt for the same and shall at the end of each month report to the state controller the total amount of money received by him on behalf of said board from all sources, and shall at the same time deposit with the state treasurer the entire amount of such receipts, and the state treasurer shall place the money so received in a special fund, to be known as the ‘state board of chiropractic examiners’ fund,’ which fund is hereby created. Such fund shall be expended in accordance with law for all necessary and proper expenses in carrying out the provisions of this act, upon proper claims approved by said board or a finance committee thereof.

“Sec. 15. Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title ‘chiropractor’ or ‘D. C.’ or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word ‘doctor’ or the prefix ‘Dr.’ without the word ‘chiropractor,’ or ‘D. C.’ immediately following his name, or the use of the letters ‘M. D.’ or the words ‘doctor of

medicine,' or the term 'surgeon,' or the term 'physician,' or the word 'osteopath,' or the letters 'D. O.' or any other letters, prefixed or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days or both.

"Sec. 16. Nothing in this act shall be construed to prohibit service in case of emergency, or the domestic administration of chiropractic, nor shall this act apply to any chiropractor from any other state or territory who is actually consulting with a licensed chiropractor in this state; provided, that such consulting chiropractor shall not open an office or appoint a place to receive patients within the limits of the state; nor shall this act be construed so as to discriminate against any particular school of chiropractic, or any other treatment; nor to regulate, prohibit or apply to any kind of treatment by practice of religion. Nor shall this act apply to persons who are licensed under other acts.

"Sec. 17. It shall be the duty of the several district attorneys of this state to prosecute all persons charged with the violation of any of the provisions of this act. It shall be the duty of the secretary of the board, under the direction of the board, to aid attorneys in the enforcement of this act.

Sec. 18. Nothing herein shall be construed as repealing the 'medical practice act' of June 2, 1913, or any sub-

sequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.

“Sec. 19. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act. The electors hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.”

No. 14802.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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DEC - 3 1955

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No. 14802.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

Under 21 U.S.C. 334(a) and (d), the District Court had jurisdiction to condemn the devices involved in this appeal, to permit the Claimant to attempt to salvage the condemned devices under conditions which would assure their being brought into compliance with law, and to rule upon the legality of the Claimant's proposed method of distributing such devices.

Under 28 U.S.C. 1291, this Court has jurisdiction to review the decisions of the District Court.

II.

STATEMENT OF FACTS.

The present appeal is an outgrowth of an *in rem* seizure action instituted in the District Court September 5, 1952, by the United States pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) seeking condemnation of 75 devices, more or less, designated as "The Schlessing Ultrasoniseur." [R. 3-7.] Authority for such action stems from 21 U.S.C. 334(a) which provides for condemnation of any device that is adulterated or misbranded when introduced into or while in interstate commerce. The devices had been shipped by A. Schlessing and Co., Inc., from St. Louis, Missouri, to chiropractors practicing in Southern California within the jurisdiction of the District Court. [R. 3, 9.]

The Libel of Information alleged that these devices were misbranded in violation of 21 U.S.C. 352(a) because their labeling bore false and misleading therapeutic claims for many disease conditions ranging from abscesses to ulcers. [R. 4-5.]

The Libel alleged that the devices were further misbranded in violation of 21 U.S.C. 352(a) because their labeling contained such false and misleading statements as "This Machine Is Absolutely Safe"; "No special skill, no involved instructions and no long experience is necessary to use the Schlessing Ultrasoniseur properly"; and "There are no contra-indications. No danger of deep burns, tissue damage or irritation. Equally important, there are no possible harmful effects to the person administering treatment." [R. 5-6.]

The Libel also alleged that the devices were misbranded in violation of 21 U.S.C. 352 (f)(1) because their labeling failed to bear adequate directions for use. [R. 6.]

Finally, the Libel alleged that the devices were adulterated in violation of 21 U.S.C. 351(c) because their strength differed from and their quality fell below that which they purported and were represented to possess, since their ability to produce total sound output differed materially from the ability they were represented to possess, and the output meter did not accurately gauge the energy density output of the devices. [R. 6.]

On October 22, 1952, Mr. A. Schlessing of St. Louis, Missouri, intervened as Claimant in this proceeding. [R. 8.] He is the president of A. Schlessing and Co., Inc., which manufactured these devices. He is also the agent of the owners and consignees of the devices.

Also on October 22, 1952, a Consent Decree of Condemnation was filed in this case. [R. 8-14.] By its terms, the devices under seizure were adjudged adulterated and misbranded as alleged in the Libel and were condemned under 21 U.S.C. 334(a). [R. 9.] In addition, pursuant to 21 U.S.C. 334(d), Claimant was accorded the privilege of attempting to bring the devices into compliance with law under supervision of a duly authorized representative of the Federal Security Administrator [R. 10-13], hereinafter called the Secretary.¹

One provision in the Consent Decree declares in substance that the Claimant shall not distribute the devices

¹The Federal Security Administrator was then the head of the Federal Security Agency which was charged with the administration of the Federal Food, Drug and Cosmetic Act. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953, and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare was established to administer the functions formerly in that Agency, under the supervision and direction of the Secretary of that Department. (18 Fed. Reg. 2053.)

until he obtains a written release from a representative of the Secretary, and there is a further proviso that

“Claimant shall make no distribution of said articles or any part of them except in strict accord with such term and conditions as may be included in said written release.”

[R. 11, par. (4).] This provision is in line with 21 U.S.C. 334(d) which vests supervisory control over salvaging operations in the Secretary. See *U. S. v. 1322 Cans . . . Black Raspberry Puree*, 68 F. Supp. 881 (N.D. Ohio, 1946).

Claimant thereupon arranged to ship the 47 devices actually seized by the United States Marshal, back to his place of business at St. Louis, Missouri, where 6 of them were reconditioned from a physical standpoint to the satisfaction of the Department of Health, Education, and Welfare. [R. 18.] Reconditioning of the remaining 41 devices has been suspended until a final decision is reached regarding the legality of Claimant's proposed method of distribution of the 6 reconditioned devices. [R. 18.]

Claimant's proposal was to ship the 6 reconditioned devices back to the licensed California chiropractors in whose possession these devices were seized at the outset of this proceeding. [R. 19.] The Department refused to release the devices for such distribution. [R. 19.]

It is agreed by the parties that these ultrasonic devices produce high frequency sound waves which have therapeutic value in the treatment of osteoarthritis and bursitis. [R. 20-23.] It is also agreed [R. 19, par. (5)]:

“Ultrasonic therapy cannot be employed safely and efficaciously by the layman in self-medication, but requires competent supervision in its administration.

Adequate directions for unsupervised lay use cannot be written for ultrasonic devices, within the meaning of 21 U.S.C. 352 (f)(1). Interstate distribution which would not violate the Federal Food, Drug, and Cosmetic Act must therefore comply with the regulations which exempt devices from bearing adequate directions for use in their labeling. (21 C.F.R. §1.106, as amended.) One provision of these regulations exempts a device which is shipped to ‘*a practitioner licensed by law to * * * use or direct the use of the device.*’ (21 C.F.R. §1,106(e)).”

The Department’s refusal to release the reconditioned devices for distribution in the manner proposed by Claimant was based upon its view that California chiropractors are *not licensed by law to use or direct the use of ultrasonic devices*. [R. 19-20, par. (6).] Consequently, shipment of the devices to the chiropractors would not meet the conditions of the exemption regulations.² Since the devices would not bear adequate directions for use in their labeling as required by 21 U.S.C. 352(f)(1), and would not be exempt from that requirement, they would be misbranded.

In the Consent Decree of Condemnation, the District Court had expressly retained jurisdiction “to issue such further Decrees and Orders as may be necessary to the proper disposition of this proceeding.” [R. 13.]

²In addition, paragraph (7) of the Consent Decree of Condemnation declares [R. 12]:

“The Claimant shall not sell or dispose of said articles or any part thereof in a manner contrary to the provisions of the Federal Food, Drug and Cosmetic Act, *or the laws of any State * * * in which they are sold or disposed of.*”

On May 24, 1954, Claimant filed with the District Court a Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices Under Seizure. [R. 27-29.] The Motion asserts that the Department's refusal to approve was based upon an erroneous interpretation of the scope of a license granted under the California Chiropractic Act.

On February 10, 1955, the District Court filed an Order denying Claimant's Motion and giving Claimant 90 days to submit any other proposal for distribution to the Department. [R. 49-50.] On the same day, the District Court also filed Findings of Fact and Conclusions of Law. [R. 40-49.]

On April 7, 1955, Claimant filed a Notice of Appeal from the District Court's Order of February 10, 1955. [R. 51.]

On May 17, 1955, the District Court filed a Final Order directing Claimant to return the devices to the United States Marshal, and directing the Marshal to offer the devices for sale under conditions to be specified by the Department. [R. 51-53.]

Also on May 17, 1955, on Stipulation by the parties, the District Court filed an Order which stayed execution of the Final Decree during the pendency of this appeal, said Order also reducing the performance bond and permitting the removal of the devices to a warehouse. [R. 54-55.]

On May 27, 1955, Claimant filed a second Notice of Appeal, this time from the Final Decree of May 17, 1955.

III.

QUESTIONS PRESENTED.

(1) Does Claimant's proposal that the 6 reconditioned ultrasonic devices be shipped to chiropractors licensed and residing in California, satisfy the requirements of 21 C.F.R. §1.106(e) so as to exempt the devices from bearing adequate directions for use in their labeling, as required by 21 U.S.C. 352(f)(1)?

(2) Was the District Court clearly in error in its finding of fact that a chiropractor who is licensed under the laws of California is not authorized to use or direct the use of the ultrasonic devices under seizure in this case?

IV.

PERTINENT STATUTES AND REGULATIONS.

21 U.S.C. 334 (a).

"Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce . . . shall be liable to be proceeded against . . . on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found . . ."

21 U.S.C. 352.

"A drug or device shall be deemed to be misbranded—

"(a) If its labeling is false or misleading in any particular."

* * * * *

"(f) Unless its labeling bears (1) adequate directions for use; . . . *Provided*, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public

health, the Secretary shall promulgate regulations exempting such drug or device from such requirement."

21 U.S.C. 351.

"A drug or device shall be deemed to be adulterated—

* * * * *

"(c) If . . . its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess."

21 U.S.C. 334 (d).

"Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may . . . direct . . .; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold: *Provided*, that after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Secretary"

21 Code of Federal Regulations Sec. 1.106 (e).

"Exemptions for drugs and devices shipped directly to licensed practitioners, hospitals, clinics, or public-health agencies for professional use.

" . . . a drug or device shipped directly to or in the possession of a practitioner licensed by

law to administer the drug or to use or direct the use of the device, or shipped directly to or in the possession of a hospital, clinic, or public-health agency, for use in the course of the professional practice of such a licensed practitioner, shall be exempt from section 502 (f)(1) of the act [21 U.S.C. 352 (f)(1)] if it meets the conditions of paragraphs . . . (d)(2) and (3) of this section.”

21 Code of Federal Regulations Sec. 1.106.

“(d) *Exemption for prescription devices*

“A device which, because of any potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and hence for which ‘adequate directions for use’ cannot be prepared, shall be exempt from section 502 (f)(1) of the act [21 U.S.C. 352 (f)(1)] if all the following conditions are met:

* * * * *

“(2) The label of the device (other than surgical instruments) bears:

“(i) The statement ‘Caution: Federal law restricts this device to sale by or on the order of a,’ the blank to be filled in with the word ‘physician’, ‘dentist,’ ‘veterinarian,’ or with the descriptive designation of any other practitioner licensed by the law of the State in which he practices to use or order the use of the device; and

“(ii) The method of its application or use.

“(3) The labeling of the device (which may include brochures readily available to licensed practitioners) bears information as to the use of the device by practitioners licensed by law to use it or direct its use”

California Chiropractic Act of 1922.

West's Annotated California Codes, Business and Professions, Section 1000 ff, page 45 ff.

Deering's California Codes Annotated, Business and Professions, Vol. 2, Appendix, page 519 ff.

[Note: Appellant has printed this Act as an appendix to his opening brief.]

V.

SUMMARY OF ARGUMENT.

A. Introduction.

The ultrasonic devices in question have value in the treatment of some conditions. However, they cannot be used safely and efficaciously by the layman without professional supervision. Therefore, “adequate directions for use” cannot be written for these devices as required by 21 U.S.C. 352(f)(1), but they may be exempt from this requirement if they comply with the conditions of exemption.

One condition of exemption is that the devices be shipped to “a practitioner licensed by law . . . to use or direct the use of the device.” Since Claimant has proposed to ship the reconditioned devices to California chiropractors, the fundamental issue is whether a license issued under the California Chiropractic Act authorizes its holder to use ultrasonic devices in his practice of chiropractic.

B. Scope of Authority of California Chiropractors.

(1) Definition of Problem.

Under the California Chiropractic Act, a licensee is authorized (1) to practice chiropractic as taught in chiropractic schools or colleges, and (2) to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but not to practice medicine.

It is therefore necessary to determine (1) whether ultrasonic therapy is part of the practice of chiropractic as taught in chiropractic schools or colleges, and (2) whether ultrasonic therapy is a necessary mechanical measure incident to the care of the body which does not constitute the practice of medicine.

This case calls for interpretation of a California law. There are two reported opinions of the Appellate Department, Superior Court, Los Angeles County which, if binding on this Court, would dispose of the appeal in favor of the Government. Under criteria announced by this Court, those opinions would not be binding. The Court may choose to restate those criteria. On the other hand, if the appeal is decided on the merits, the State Court decisions would at the least be highly persuasive.

(2) Is Ultrasonic Therapy Part of the Practice of Chiropractic as Taught in Chiropractic Schools or Colleges?

Chiropractic is a system for the practice of adjusting the joints, especially at the spine, *by hand*, for the treatment of disease and ailments. This was the connotation of chiropractic in 1922 when the California Chiropractic Act was adopted, and it remains the authoritative definition of chiropractic today. Amendments of this Act and legislative enactments in other fields have not changed the scope of authority of a licensed California chiropractor.

Many subjects other than chiropractic are taught in chiropractic schools but it is only *chiropractic* as taught in those schools that a licensed chiropractor is authorized to practice.

In the early 1920's, chiropractic schools taught "adjunct" methods of healing such as electrotherapy and hydrotherapy but these methods were candidly recognized as not being chiropractic.

Ultrasonic therapy is not a part of *chiropractic* as taught in chiropractic schools or colleges.

(3) Is Ultrasonic Therapy a Necessary Mechanical Measure Incident to the Care of the Body Which Does Not Constitute the Practice of Medicine?

Section 7 of the Chiropractic Act authorizes a licensee to use necessary mechanical, hygienic and sanitary measures incident to the care of the body which do not invade the field of medicine and surgery.

Section 7 does not authorize use of a mechanical measure if it is part of the practice of medicine. Only a *chiropractic* mechanical measure such as a chiropractic table is authorized.

Ultrasonic therapy is used by medical doctors in the treatment of their patients and is a part of the practice of medicine.

C. Unsuccessful Attempts to Amend the California Chiropractic Act Substantiate View That Authority of Licensed Chiropractor Is Narrowly Limited.

Failure to adopt proposed amendatory legislation does not provide a binding interpretation of the Act but may be considered by the Courts.

An Initiative Proposal in 1939 to amend the Chiropractic Act would have broadened a licensee's authority by permitting him (1) "to diagnose and treat diseases, injuries, deformities, or other physical or mental conditions," and (2) to use any type of diagnostic or treating measure other than drugs or surgery. Chiropractors who opposed this measure stated it would "authorize chiropractors to practice medicine under chiropractic licensure."

The Proposal was rejected at the polls.

D. Miscellaneous Points.

(1) The Burden of Proof Is Upon Appellant.

Since the Appellant seeks an exemption from the statutory requirement that the labeling of the devices bear adequate directions for use, he has the burden of showing compliance with the conditions of exemption.

Here he must show that the chiropractors to whom the devices are to be shipped are licensed by law to use or direct the use of the devices.

(2) The Federal Food, Drug, and Cosmetic Act Is an Instrument of Public Protection.

The Federal Food, Drug, and Cosmetic Act is designed to protect the public health and pocketbook, and is construed so as best to effectuate that objective.

CONCLUSION.

Since Appellant has not established that California chiropractors are licensed by law to use the ultrasonic devices in question, distribution to such persons would violate the Federal Food, Drug, and Cosmetic Act.

The judgment of the District Court should be affirmed.

VI.

ARGUMENT.

A. Introduction.

Ultrasonic therapy is a relatively new addition to the armamentarium of the physician in his combat against disease. As is true of so many other "miracle" drugs and devices, enthusiasts and promoters of this therapy hastened to proclaim it as virtually a panacea and minimized or completely overlooked its potential hazards. Such premature,³ extravagant, and ill-considered representations are not in the public interest. Representations of this type were in part the basis for the initial proceeding against the devices here in question. [R. 4-6.]

Claimant thereafter revised the labeling for the devices under seizure to eliminate unwarranted claims and misleading representations. [R. 18, par. (3).] The Department of Health, Education, and Welfare has no objection to this labeling. It is a matter of concern to the Department, however, that devices of this type should be used only by qualified persons in treating the public.

The Federal Food, Drug, and Cosmetic Act requires that the labeling of a device bear adequate directions for use [21 U.S.C. 352 (f)(1)], and a proviso of that section authorizes the Secretary to promulgate regulations which exempt devices from such requirement when "not necessary for the protection of the public health." Such

³Competent investigators are constantly exploring and appraising the potential of ultrasonic therapy for good and bad. In Exhibit A attached to the Stipulation of Facts [R. 22, footnotes 2, 3 and 4], there are listed a few references to articles in American scientific publications on the medical uses of ultrasound. The titles of these articles alone suggest the scope and significance of the work which has been done and is yet to be done in this field.

exemption regulations have been promulgated. [21 C.F.R. §1.106(b) *et seq.*] Where, as is here agreed, adequate directions cannot be written for safe and efficacious lay use without professional supervision, the device may be exempt from the “adequate directions for use” requirement only if the conditions of exemption are met. See *U. S. v. El-O-Pathic Pharmacy, et al.*, 192 F. 2d 62, 75 (C.A. 9, 1951).

One condition in the exemption regulations is that the device be shipped to “a practitioner licensed by law . . . to use or direct the use of the device.” [21 C.F.R. §1.106(e).] It would of course be possible for the Secretary to promulgate exemption regulations under Section 352 (f) which would disregard State licensing laws and set up independent federal qualifications that would have to be met by the practitioner to whom the device is shipped before there could be any exemption. But the pattern of the Federal Food, Drug, and Cosmetic Act and the regulations involved in this case give full faith and credence to the licensing laws of each State and do not seek to superimpose a federal licensing system in the field of the healing arts. This regulatory plan is reasonable and in furtherance of the recognition of each State’s authority over internal matters.

For these reasons, and since Claimant wished to ship the devices to California chiropractors, the principal issue before the District Court was whether a chiropractor practicing under the Chiropractic Act of California is licensed to use ultrasonic devices such as those under seizure. The District Court found that ultrasonic therapy is not a part of the practice of chiropractic, that it is a part of the practice of medicine, and that a chiropractor licensed under the laws of California is not authorized to use or direct

the use of the ultrasonic devices under seizure in this case. [R. 45-46.]

On appeal, the ultimate question is whether these findings of the District Court are clearly erroneous. [Rule 52(a), Federal Rules of Civil Procedure.]

B. Scope of Authority of California Chiropractors.

(1) Definition of Problem.

The authority of a California chiropractor stems from the Chiropractic Act, an initiative measure approved in 1922. [West's Annotated California Codes, Business and Professions, Section 1000 ff, page 45; Deering's California Codes Annotated, Business and Professions, Vol. 2, Appendix, page 519.] Section 7 of that Act reads:

"Certificate to Practice

"One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated 'License to practice chiropractic,' which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included *in materia medica*."

The restrictive nature of the chiropractor's authority is emphasized by a comparison with the statutory authority granted to physicians and surgeons. Deering's California Codes Annotated, Business and Professions, Vol. 1, §2137, provides:

“Practice authorized by certificate: Physician’s and surgeon’s certificate.

“The physician’s and surgeon’s certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and *to sever or penetrate the tissues of human beings* and *to use any and all other methods* in the treatment of diseases, injuries, deformities, or other physical or mental conditions.” [Emphasis added.]

The scope of the “practice of medicine” is broad, broad enough to encompass anything done by a chiropractor. But the Chiropractic Act has carved out a limited area within which it is legitimate for a chiropractor to operate. His authority, however, is only that which is expressly conferred by Section 7 of that Act—namely:

(1) to practice *chiropractic* as taught in chiropractic schools or colleges, and

(2) to use all *necessary mechanical*, and hygienic and sanitary *measures incident to the care of the body*, but not to practice medicine, surgery, osteopathy, dentistry, or optometry, and not to use any drug or medicine included in *materia medica*.

Thus, the principal problem resolves itself into two parts:

(a) Is ultrasonic therapy part of the practice of chiropractic as taught in chiropractic schools or colleges?

(b) Is ultrasonic therapy a necessary mechanical measure incident to the care of the body which does not constitute the practice of medicine?

Obviously, this Court is being called upon to interpret provisions of a law of the State of California. A number

of courts of that State have already interpreted those provisions in the manner we are urging here, as we will point out in our subsequent argument. This Court has announced criteria as to the circumstances under which interpretations of California law by California State courts will be binding upon this Court. *State of California, Department of Employment v. Fred S. Reynauld & Co., Inc.*, 179 F. 2d 605 (C.A. 9, 1950). On page 609, the Court stated:

“We think the rationale of *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64 . . . and *King v. United Commercial Travelers*, 1948, 333 U.S. 153 . . . is that federal courts are bound (a) when the supreme judicial tribunal of the state has decided a given question, or (b) a state appellate court which is in the line of the state appellate structure leading up to the supreme tribunal of the state has decided it, or (c) a goodly number of the trial courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point.”

Two California decisions were cited as binding in the *Reynauld* case. One was an *unreported* decision of the Appellate Department, Superior Court, San Francisco County, and the other was an *unreported* decision of the trial department, Superior Court, San Francisco County. This Court declared that neither decision fell within any of the above-quoted categories. Other factors were also present. On page 608, footnote 4, the Court said:

“That we are here concerned with a statutory provision written into California law verbatim from a federal statute is a further inducement for our con-

sideration of the case on its merits . . . Apparently no federal court has had occasion to construe the federal statute in these circumstances.”

In the present appeal, this Court is asked to interpret a California Initiative Act which is not patterned after any federal statute. Two *reported* California decisions which we will later discuss more fully, both by the Appellate Department, Superior Court, Los Angeles County, are dispositive of this appeal in favor of the appellee if they are binding on this Court. *People v. Fowler*, 32 Cal. App. 2d (Supp.) 737, 84 P. 2d 326 (1938); *People v. Mangiagli*, 97 Cal. App. 2d (Supp.) 935, 218 P. 2d 1025 (1950).⁴ As we will show, every reported California decision (including those of District Courts of Appeal and the Supreme Court) which has touched upon the meaning

⁴The *Fowler* case has been cited with general approval of its rulings on chiropractic by a California District Court of Appeal, and by several of the highest courts of other states:

People v. Nunn, 65 Cal. App. 2d 188, 194, 150 P. 2d 476, 480 (Dist. Court of Appeal, Second Dist., Div. 2, 1944);

State v. Moore, 117 P. 2d 598, 604 (Supreme Court of Kansas, 1941)—speaks of the *Fowler* case as a “well-considered decision”;

Lynch v. State, 145 P. 2d 265, 270 (Supreme Court of Washington, 1944);

State v. Wagner, 297 N. W. 906, 910 (Supreme Court of Nebraska, 1941);

Smith v. State Board of Medicine, 259 P. 2d 1033, 1038 (Supreme Court of Idaho, 1953).

The latter case also cites the *Mangiagli* case. In *California Procedure*, Vol. 1, p. 247 (1954), Witkin says of reported memorandum opinions of the Appellate Department, Superior Court:

“The total number of such reported opinions is not large, but their coverage is extensive. Since they often deal with questions which do not reach the higher reviewing courts, they are of considerable value and are freely cited by the Supreme Court and district courts of appeal.”

of chiropractic or the scope of chiropractic licensure, has expressed views in harmony with the *Fowler* and *Mangiagli* cases.⁵ Two attempts made to amend the Chiropractic Act in a manner that would overcome the restrictive effect of the *Fowler* and *Mangiagli* cases, have been defeated at the polls.

We have briefly mentioned the California decisions and the conformity doctrine at the outset of our argument so that the Court will be alerted to their underlying significance here. The Court after full consideration may choose to decide the case on the merits or may elect to restate the views it expressed in the *Reynauld* case *supra* so as to make the *Fowler* and *Mangiagli* cases binding in this appeal.

⁵Appellant cites the unreported case of *Purviance v. Brockman* (Trial Department, Superior Court, Amador County, No. 4284, 1939). [Appellant's Opening Brief, p. 41.] This appears to be the only California case which suggests that a chiropractor may use hydro-therapy, electro-therapy, heat, and enemas. There is, of course, nothing even in that case about ultrasonics. As far as our research has disclosed, with the exception of the *Purviance* case, California unreported cases which have considered the question have uniformly ruled that chiropractic consists solely of manual adjustment and does not include such modalities as electrode treatment or radionic treatment:

People v. Arnold Morris Lovaas (Superior Court, Orange County, C5240, May 26, 1942);

Credit Bureau of San Jose v. Josephine DePonzi (Superior Court, Santa Clara County, No. 77390, July 2, 1951);

McGranahan v. Berger et al. (Superior Court, San Francisco County, No. 257,362, October 6, 1938).

In the *Credit Bureau* case, the Court ruled that radionic treatments which "caused high frequency radionic waves to enter the patient with either stimulating or relaxing effects" were not authorized under Section 7 of the Chiropractic Act. In the present case, we are dealing with high frequency sound waves which penetrate the body and may affect tissues of the body located inches below the surface. [R. 18-19, par. 4.]

(2) Is Ultrasonic Therapy Part of the Practice of Chiropractic as Taught in Chiropractic Schools or Colleges?

The meaning of the term “chiropractic” is fundamental to the consideration of this appeal. It was found by the trial court that—

“Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments.” [R. 45.]

In an analogous case, the same court had earlier expressed a similar viewpoint. *U. S. v. 22 Devices . . . Halox Therapeutic Generator*, 98 F. Supp. 914, 918 (S.D. Calif., 1951). In both instances, the court relied upon interpretations of California State courts, particularly *People v. Fowler*, 32 Cal. App. 2d (Supp.) 737, 84 P. 2d 326 (Appellate Department, Superior Court, Los Angeles County, 1938).

The *Fowler* case is the most exhaustive California decision as to what constitutes the practice of chiropractic as authorized by Section 7 of the Chiropractic Act. Declaring that the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted [32 Cal. App. 2d (Supp.) 746], the Court quotes extensively from dictionaries, encyclopedias, Corpus Juris, and court cases that were current in 1922 when the Chiropractic Act was adopted. [32 Cal. App. 2d (Supp.) 745-747.] On page 746, the Court said:

“In *State v. Hopkins* (1917), 54 Mont. 52 [166 Pac. 304, 306, Ann. Cas. 1918D, 956], the court quoted from Webster’s New Standard Dictionary this definition of ‘Chiropractic’: ‘A system of [or] the practice of adjusting the joints, especially of the spine, by hand for the curing of disease.’ ”

* * * * *

“Nor has the accepted meaning of ‘chiropractic’ since changed, for in the latest (1938) edition of Webster’s New International Dictionary we find the same definition quoted in *State v. Hopkins, supra*”⁸

And on page 747, the Court added:

“The court’s instruction defining ‘chiropractic’ in the words already quoted from Webster’s New Standard Dictionary was correct.”

In a later case, the same Court emphatically reaffirmed the holdings in the *Fowler* case. *People v. Mangiagli*, 97 Cal. App. 2d (Supp.) 935, 218 P. 2d 1025 (Appellate Dept., Superior Court, L. A. County, 1950). On page 938, the Court said:

“The legal problems presented here are substantially identical with those considered in *People v. Fowler* This court discussed there at some length the construction of the several statutes above mentioned and their effect on each other, and without repeating all that was said we approve of and adhere to it.”

* * * * *

“This matter was discussed in the *Fowler* case, *supra*, where we held that section 7 authorized, by the provision numbered as [1] above, nothing that was not chiropractic, as that term was understood in 1922, when the act was passed, and that the term was then defined as ‘a system of [or] the practice of adjusting the joints, especially of the spine, by hand for the curing of disease.’”

⁸The 1955 edition of Webster’s New International Dictionary, Unabridged, defines chiropractic as:

“A system, or the practice, of adjusting the joints, esp. of the spine, by hand for the curing of disease.”

In *Quail v. Industrial Accident Commission of California*, 138 Cal. App. 412, 417, 32 P. 2d 402, 404 (Dist. Ct. of Appeal, Calif., 3rd Dist., 1934), the Court stated:

“The term ‘Chiropractic’ is defined as a system of curing disease by means of adjusting the joints of the spine by hand.”

The earliest California case which discusses the definition of chiropractic is that of *Ex parte Greenall*, 153 Cal. 767, 96 Pac. 804 (1908). There the Supreme Court did not state its own view but simply repeated the definition advanced by counsel. On page 769, the Court said:

“We are informed in the briefs that the word ‘chiropractic’ means a treatment somewhat analogous to that of osteopathy, the removal of the cause of disease without the use of drugs or any other means except the adjustment of the vertebra of the spine by manipulating them with the hand.”

In the Dictionary of American Biography, there is a sketch of the founder of chiropractic, Daniel David Palmer, which includes the following statements:

“The name chiropractic was suggested for the new science by the Rev. Samuel H. Weed of Bloomington, Ill., an early patient. The name (Greek *cheir*, hand, and *praktikos*, efficient) was freely translated by Palmer as ‘done by hand’.”

The Courts of other states have expressed views similar to those of the California Courts in defining the authority of chiropractors as limited to adjustments by hand. Note especially the two opinions in *State v. Boston*, 278 N. W. 291 and 284 N. W. 143 (Sup. Ct. of Iowa, 1938 and

1939), where the defendant, a chiropractor, was enjoined (278 N. W. at 293) among other things

“from the use of physiotherapy, electrotherapy, colonic irrigation, colon hygiene, ultra-violet rays, infra-red rays, radionics machines, traction tables, white lights, cold quartz ultra violet light, neuroelectric vitalizer, electric vibrator, galvanic current and sinusoidal current . . .”

The Iowa statute applicable in the *Boston* case defines chiropractors as:

“Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments.”

This definition is more specific than that in Section 7 of the California Chiropractic Act, but it is noteworthy that the Iowa Supreme Court said of the Iowa statute (284 N. W. at page 144):

“The statutory definition does not vary to any great extent from the well-known and generally accepted definition of this form of the healing art.”⁷

⁷For similar holdings in other states, see also: *People v. Ring*, 275 Ill. App. 214, 217 (Ill. Appellate Court, Fourth Dist., 1934); *State Board of Medical Examiners v. McHenry et al.*, 69 So. 2d 592, 596 (Court of Appeals, Louisiana, 1953); *Commonwealth v. Zimmerman*, 108 N. E. 893, 894-5 (Supreme Court, Mass., 1915); *Joyner v. State*, 179 So. 573, 575-6 (Supreme Court, Miss., 1938); *Bakewell v. Kahle*, 232 P. 2d 127, 128 (Supreme Court, Mont., 1951); *State Board of Medical Examiners v. Grossman*, 48 A. 2d 700, 702 (Supreme Court, N. J., 1946), aff'd 52 A. 2d 699 (N. J. Court of Errors and Appeals, 1947); *People v. Johnerson*, 49 N. Y. Supp. 2d 190, 194-5 (Kings County Court, N. Y., 1944); *Nicodeme v. Bailey*, 243 S. W. 2d 397, 399 (Court of Civil Appeals, Texas, 1951); *Board of Medical Examiners v. Freenor*, 154 Pac. 941, 942 (Supreme Court, Utah, 1916); *Walkenhorst v. Kesler*, 67 P. 2d 654, 658, 662 (Supreme Court, Utah, 1937); *State v. Houck*, 203 P. 2d 693, 698 (Supreme Court, Wash., 1949).

Appellant quotes from the laws of several other States in an effort to show that "chiropractic" does not have a uniform meaning throughout the country. [Appellant's Brief 49-51]. We are here concerned with the meaning of language used in a California Initiative Act. The legislature of one State may of course define a term differently from that of another. We have made no effort to compile the statutes relating to chiropractic in those States which authorize its practice. But in examining the statutes which Appellant cites, together with their legislative history, we have noted several points which clearly support our position in this appeal.

The statutory pattern shows that chiropractic laws were adopted in some states in the 1910s and 1920s. These laws were highly restrictive and limited chiropractic to manipulation by hand. Subsequently, chiropractic groups have endeavored to obtain legislation which would broaden the scope of their authorized practice. In some instances they have been successful. In California, they have not as we will discuss in detail in Part C of this argument.

In Arizona, practice is still limited to adjustment "by hand." [Appellant's Brief 49.] This statute was enacted May 18, 1921. [Session Laws of Arizona, 1921, page 262, section 6(c).] An initiative measure "to provide for the improvement of the practice of chiropractic" was defeated in 1932. [See 1933 Session Laws of Arizona, page 614.]

Appellant's Brief, page 50, quotes the Nevada law as amended on March 28, 1955. But the Nevada law as adopted on February 19, 1923, declared:

"Chiropractic is defined to be the science of palpat-ing and adjusting the articulations of the human spinal column by hand only. This definition is inclu-sive, and any and all other methods are hereby de-

clared not to be chiropractic.” [Nevada Compiled Laws 1929, Vol. 1, Sec. 1084.]

In 1949, the Nevada statute was amended to provide for two types of licenses—chiropractic and chiropractic-physiotherapy. [Nevada Compiled Laws Supplement 1943-1949, page 60, section 1084.] The definition of “chiropractic” continued to limit that practice to palpation and adjustment “by hand only.” A broader definition was adopted for the separate practice of “chiropractic-physiotherapy.” Finally in 1955, the law was again amended as cited by Appellant.

Similarly with respect to the Idaho law, Appellant’s Brief (page 50) cites the statute as it was amended in 1937. [Session Laws of Idaho, 1935-1937, Section 6, pages 277-278.] But as it was originally adopted on March 11, 1919, it did not authorize a licensee to adjust “displaced tissue of any kind or nature” or to “practice physiotherapy, electrotherapy, hydrotherapy, as taught in chiropractic schools and colleges.” [Session Laws of Idaho 1919, page 538, Section 11.]

The Ohio statute quoted on page 51 of Appellant’s Brief does not define “chiropractic” but lists it as a separate limited branch of medicine to be regulated by the state medical board. Other branches separately listed are mechanotherapy, electrotherapy, and hydrotherapy, indicating a legislative recognition that chiropractic does not include the others.

Throughout Appellant’s Brief, the term “adjunct therapy” is frequently used with the suggestion that “chiropractic” includes manipulation by hand and all other methods which a chiropractor may deem an “adjunct” to hand manipulation. The Chiropractic Act does

not use this term in defining the scope of a licensee's practice. In Webster's New International Dictionary Unabridged, Second Edition, 1955, the word "adjunct" is defined as—

"Something joined or added to another thing, but not essentially a part of it."

This definition seems most appropriate here.

On page 37 of his brief, Appellant candidly states his concept of chiropractic:

" . . . chiropractic is the maintenance of structural and functional integrity of the nervous system as being the cause of disease and . . . the practice of chiropractic consists of the use of any and all techniques and means to remove nerve interference at any place in the body including the vertebrae."

This viewpoint, however, was at one time incorporated almost verbatim in a regulation of the Board of Chiropractic Examiners and declared void in *People v. Mangiagli*, 97 Cal. App. 2d (Supp.) 935, 943, 218 P. 2d 1025, 1030 (Appellate Dept., Superior Ct., L. A. County, 1950). In that case a licensed chiropractor was convicted of violating the medical practice act and the conviction was affirmed on appeal. Defendant then filed a petition for rehearing urging the validity of the regulation. Rejecting this argument, the Court stated:

Page 943

"In his petition for rehearing defendant asserts that our decision cannot stand because it is in conflict with a regulation of the Board of Chiropractic Examiners adopted October 22, 1949, defining chiropractic thus: 'The basic principle of chiropractic is the maintenance of the structural and functional integrity of the nervous system. The practice of chiro-

practic consists of all necessary means to carry out these principles.' . . . The conflict between this regulation and the meaning of 'chiropractic' as defined in our opinion herein, and in *People v. Fowler* . . . is fairly obvious. Under this regulation a licensed chiropractor might very well engage in a great variety of medical and surgical practice; indeed, it would be difficult to discover any sort of treatment of the sick or afflicted that could not, by a little ingenuity, be brought within it. But this does not cause us to doubt the correctness of our decision; it leads us, rather, to the conclusion that the regulation is void."

That regulation has been reworded so that it now reads:

"The basic principle of chiropractic is the maintenance of structural and functional integrity of the nervous system. The *practice of chiropractic consists of the use of any and all subjects enumerated in Section 5* and referred to [in] any and all other sections of the act." [California Administrative Code, Title 16, Sec. 302(a).]

Section 5 of the Chiropractic Act enumerates the minimum educational requirements for a chiropractor. When the Act was adopted in 1922, the following was the complete list of subjects specified in Section 5:

Anatomy

Histology

Elementary chemistry and toxicology

Physiology

Bacteriology

Hygiene and sanitation

Pathology

Diagnosis or analysis

Chiropractic theory and practice

Obstetrics and gynecology. [Calif. Stats. 1923, p. XC.]

PHYSIOTHERAPY WAS NOT LISTED.

In 1947, however, as Appellant points out on pages 58 and 63 of his brief, Section 5 of the Act was amended to include physiotherapy. [Calif. Stats. 1947, ch. 151, p. 678.] Since the current regulation quoted above defines the practice of chiropractic to consist of the use of all subjects enumerated in Section 5, the argument apparently is that a chiropractor may now utilize physiotherapy in his practice.

A related argument was made and rejected in *People v. Mangiagli, supra*, 97 Cal. App. 2d (Supp.) 935, 939, where the Court said:

“In other words, the limits of permissible practice by the holder of a chiropractic license, as fixed by section 7 of the statute, do not extend, under the provision we have numbered [1], beyond the scope of chiropractic as that term was understood and defined in 1922, and the ambitious attempts of chiropractic schools or colleges to extend them by teaching other subjects under the guise of chiropractic must fail, so long as the statute remains as it is now. *The statute has been amended by a proposal made by the Legislature in 1947* (Stats. 1947, pp. 676-680), and approved by popular vote; *but these amendments so made have not changed section 7 of the act*, and we find nothing in the changes of other sections which affects or alters the meaning of section 7.”
[Emphasis added.]

Manifestly, it is the expressed judicial view that Section 7 of the Chiropractic Act, which alone deals with the scope of a chiropractor's authority under that Act, may not be enlarged by indirection. Consequently, the use of physiotherapy does not become a part of the practice of chiropractic simply because it is included in the chiropractic curriculum.

Another oblique argument is advanced by Appellant on pages 44-45 of his brief where he cites *Oosterveen v. Board of Medical Examiners*, 112 Cal. App. 2d 201, 246 P. 2d 136 (Dist. Ct. of Appeal, Second Dist., Div. 3, Calif., 1952) and suggests that the Court approved the use of electricity by chiropractors for healing purposes. (Parenthetically, ultrasonic therapy is not electricity.) Actually, in footnote 1 of the opinion, the appellate court set forth verbatim the trial court's definition of "Naturopathy" which includes the use of electricity. The Court then went on to say (pp. 205-206) that the use of *natural* methods of healing may be employed by physicians and surgeons, osteopaths, chiropractors, and all those who hold licenses as drugless practitioners. But on page 209, the Court observed:

"When we speak of the right to use the methods commonly employed by naturopaths, *we do not adopt the trial court's definition of naturopathy in all respects*. Some of the practices mentioned might in some circumstances be regarded as the use of drugs or medicine, which, of course, is prohibited to chiropractors." [Emphasis added.]

We submit that the *Oosterveen* case is not helpful to the Appellant's position.

Appellant's brief (pages 38-41) refers to recently enacted statutes governing physical therapy and through some tortuous argument arrives at the conclusion that chiropractors are authorized to practice all types of physical therapy. The irrelevance of these statutes to the present issue is clearly stated in the following quotation

from 23 Opinions California Attorney General 179, 181 (1954):

“The Chiropractic Initiative Act was not amended by the legislative enactment of [the physical therapy statutes], since no initiative measure can be amended except by vote of the electors unless otherwise provided in said initiative act (Calif. Constitution, Art. IV, Sec. 1), and there is no provision for legislative amendment in the Chiropractic Act. *The enactment of the two Physical Therapy Statutes in 1953 neither increased nor decreased the scope of the practice of chiropractic. To the same extent that a chiropractor could practice physical therapy before the 1953 legislation, it follows that such practice of physical therapy still is within the scope of the chiropractic license, and that to engage in such practice of physical therapy a chiropractor need not be registered . . . or licensed . . . [under the Physical Therapy Statutes.]*” [Emphasis added.]

Adjustment by hand for the treatment of disease is one form of physical therapy, but the licensed chiropractor need not comply with the new physical therapy statutes in order to continue giving manual adjustments.

Section 7 of the Chiropractic Act authorizes the holder of a license issued thereunder “to practice *chiropractic* in the state of California *as taught in chiropractic schools or colleges.*” It is only *chiropractic*, as taught in chiropractic schools, that he may practice.

In the case of *In re Hartman*, 10 Cal. App. 2d 213, 51 P. 2d 1104 (Dist. Ct. of Appeal, Fourth Dist., Calif., 1935), the Court said of Section 7 (at page 217):

“While the section contains the additional clause ‘as taught in Chiropractic schools or colleges,’ the entire

section must be taken as a whole and it cannot be taken as authorizing a license[e] to do anything and everything that might be taught in such a school. A short course in surgery or one in law might be given, incidentally, and it would not follow that the section would then authorize a licensed chiropractor to engage in such other professions. It is not sufficient that a particular practice is taught in such a school. Under the terms of the statute *it must meet the further test that it is a part of chiropractic, whatever that philosophy or method may be, and, further, that it shall not violate the provision which expressly forbids the practice of medicine.* If such a practice is not a part of chiropractic but does constitute the practice of medicine, it is not authorized under this license even though it may be taught in such a school.” [Emphasis added.]

These views were further amplified in *People v. Fowler*, *supra*, 32 Cal. App. 2d (Supp.) 737, where the Court said on page 747:

“The effect of the words ‘as taught in chiropractic schools or colleges’ is not to set at large the significance of ‘chiropractic,’ leaving the schools and colleges to fix upon it any meaning they choose. Were the word ‘chiropractic’ of unknown, ambiguous or doubtful meaning, this clause, ‘as taught’ etc., might serve to provide a means of defining or fixing its significance, but there is here no such lack of clarity. The scope of chiropractic being well known, the schools and colleges, so far as the authorization of the chiropractor’s license is concerned, must stay within its boundaries; *they cannot exceed or enlarge them* . . . If our opinion in *People v. Schuster* (1932), 122 Cal. App. (Supp.) 790, 795, is thought to go farther than this, we now qualify it in that respect,

deeming the rule just stated to be the proper one.”
[Emphasis added.]

Note *U. S. v. 22 Devices . . . Halox Therapeutic Generator*, 98 F. Supp. 914, 918; and *People v. Mangiagli*, 97 Cal. App. 2d (Supp.) 935, 939.

Appellant relies on three affidavits of chiropractors. [Appellant’s Brief, pages 29-33.] The tenor of these affidavits is that the affiants went to chiropractic colleges in California during the early 1920s, and that those colleges taught electrotherapy, hydrotherapy, and other physical modalities during that period. Each affiant asserts in substance that these fields were within the scope of chiropractic as it was understood at that time. [R. 29-37.]

Obviously, such assertions are conclusions rather than facts. Moreover, the Exhibits which are appended to the affidavits⁸ demonstrate that these assertions are *contrary to fact*. These Exhibits unequivocally show (1) that chiropractic meant manipulation by hand and (2) that electrotherapy, hydrotherapy, etc., *were* taught but as a part of a *different* system of healing, namely, *Naturopathy*.

A few excerpts from *Exhibit C* attached to Dr. Houde’s affidavit will substantiate this statement. *Exhibit C* is the Annual Announcement of the Los Angeles College of Chiropractic for 1921-1922:

Page 17

“Chiropractic is the science of locating the cause of disease, and the art of removing it by *spinal adjust-*

⁸By Stipulation, these Exhibits were not printed but are presented to the Court for consideration in this appeal in their original form. [R. 73-74.]

ments, thereby relieving impingements on the spinal nerves.

“The word Chiropractic is derived from two Greek words, *Choir* meaning *hand*, and *Praktikos* meaning *practice*.”

Page 19

“The successful treatment of the nervous system means the successful treatment of practically all diseases, *and this the Chiropractor does with the knowledge of the surrounding structures and his skillful hands.*”

Page 21

“The spine is the foundation of health . . . If the nerve is abnormal the organ controlled by it is abnormal. *Every nerve in the body can be reached directly or indirectly and can be treated manually . . .* It is the sole purpose of the Chiropractor to re-establish the proper anatomical relation between the nerves and the surrounding structures.”

Page 33

“We make our students master of Chiropractic *and every other form of treatment.*”

Pages 35-36

“*Naturopathic Methods—Chiropractically Considered*
“. . . Millions of people are abandoning drugs and turning to natural methods of treatment. Chiropractic is the one supreme and all-important method. *Dr. Cale, the president of our college, uses nothing but pure, specific, unalloyed Chiropractic* with his private patients. He needs nothing else . . . He believes implicitly in straight Chiropractic.

“*Then you might ask, why do we teach electricity, hydrotherapy and the other Naturopathic methods?*”

The answer is very simple. We teach them because we want our graduates, *in addition to being thoroughly competent in Chiropractic*, to be as competent in the use of electricity as the best electrotherapist, to be as competent in the use of hydrotherapy as the best hydrotherapist . . . In other words, *we want our graduates to know all that the best Chiropractors know*, and *in addition* to know all that the *other* fellows know. Ignorance is no virtue. Chiropractors will more quickly discover the *utter uselessness of 'adjuncts' and 'mixing'* if they use them awhile than if they are left in ignorance of them." [Emphasis added.]

From the last sentence quoted, it is obvious that the college considered Naturopathic methods to be not only independent of Chiropractic methods, but also inferior. Rarely, we submit, is the body of an affidavit so completely demolished by an Exhibit which it appends.

The "Course of Instruction" which appears on page 4 of the same *Exhibit* lists "Chiropractic Theory and Practice" separately from "Naturopathic Methods," and includes only under the latter such subjects as "Hydrotherapy" and "Electrotherapy." Many other subjects listed on that page are expressly prohibited to a chiropractor by Section 7 of the Chiropractic Act.

Dr. Hotchkiss appends to his affidavit as *Exhibit B* a 1920 brochure of the Eclectic College of Chiropractic. The concept of chiropractic entertained by this College was the same as that of the Los Angeles College of Chiropractic. However, the Eclectic College did not dis-

parage the methods of the other healing arts which it taught. A few excerpts will support these statements:

Inside of cover page

“The Eclectic College . . . (holds) full authority . . . to teach, practice and demonstrate *Chiropractic and its allied Therapeutics*”

Page 1

“. . . a school that would teach *Chiropractic as fundamental* but that would not limit its course of training to a *single* branch of Natural Healing.”

Page 2

“Therefore, Chiropractic has come to mean ‘*adjustment with the hands*,’ and it gives a clear insight into the method involved in the practice of this great modern healing agency”

Page 10

“The Eclectic idea of including *all* of the valuable and important systems of drugless treatment, *in addition to the regular Chiropractic course of study*, marks a great advance in the art of equipping the up-to-date Chiropractic Physician.” [Emphasis added.]

It is true that the course of study required of applicants for the chiropractic license by Section 5 of the Chiropractic Act and by regulations of the Board of Chiropractic Examiners covers a wider area than the scope of a license issued under Section 7 of that Act. Dr. Norcross on page 2 of his affidavit states that examinations for chiropractic licenses have at all times included questions on the theory and practice of physio-

therapy. But this is no criterion as to the scope of a license issued under Section 7.

In *Georgia Ass'n of Osteopathic Physicians and Surgeons, Inc., et al. v. Allen*, 31 F. Supp. 206 (M.D. Georgia 1940), aff'd 112 F. 2d 52 (C.A. 5, 1940), the Court had occasion to consider various Georgia statutes relating to practitioners of the healing arts. It was the Court's holding in forceful language that the breadth of an examination does not determine the scope of a license to practice. On page 213, the Court said:

"A chiropractor is examined in anatomy, physiology, symptomatology, pathology, physical diagnosis, neurology, chemistry, hygiene and sanitation, chiropractic orthopedy, nerve tracing and adjusting, as taught in chiropractic schools. His license, however, authorizes only the adjustment of patients. (84-509.) *His knowledge must be broader than his practice; he must know what he practices but may not practice all he knows.*" [Emphasis added.]

Similarly, speaking of osteopaths on the same page, the Court stated:

"However, the license authorized by 84-1209 does not necessarily include everything embraced in the examination . . . *It may be necessary for an osteopath to know numerous subjects in order to make a diagnosis and to determine whether osteopathic treatment or some other treatment is indicated. He should know when not to give an osteopathic treatment.*" [Emphasis added.]

See also *State v. Wagner*, 297 N.W. 906, 910 (Supreme Ct. of Nebraska, 1941); *People v. Ratledge*, 172 Cal. 401, 405, 156 Pac. 455 (1916).

Appellant quotes extensively from the book "Principles and Practice of Spinal Adjustment" by Arthur L. Forster (1915) [Claimant's Exhibit B] in an effort to show that more was taught *as chiropractic* in the California colleges of chiropractic than manipulation by hand. [Appellant's Brief 15-16, 34-37.] Affidavits on which Appellant relies assert that this volume was used as a textbook in the early 1920s at the Los Angeles College of Chiropractic and the Eclectic College of Chiropractic. [R. 31, 33, 36.] We have already shown how narrow was the concept of "chiropractic" in those colleges which taught *other methods* in addition to chiropractic. Forster's volume also advocated the use of *other methods in addition to chiropractic*. But he, too, recognized that chiropractic itself is manipulation by hand. Thus on page 1, paragraph 1, he said:

"Chiropractic (G. *cheir*, hand, and *praktikos*, efficient) is the art and science of treating disease by the adjustment of displaced vertebrae, thereby relieving impingement of the nerves passing through the intervertebral foramina."

And on page 315, paragraphs 1 and 2, he said:

"Briefly defined, spinal adjustment is the replacement to their normal position of subluxated vertebrae for the purpose of relieving pressure upon the nerves

. . .

"*This replacement of subluxated vertebrae is accomplished by the application of a definite thrust by the hands of the operator in contact with the affected vertebra.*" [Emphasis added.]

Other textbooks cited by Appellant (Brief, pp. 17-19) are not in the Record here.

There are four colleges of chiropractic in California, three of which have never taught ultrasonic therapy.⁹ The fourth college does teach ultrasonic therapy as a part of several courses; in that college, such teaching was first introduced in 1946, many years after approval of the Chiropractic Act in 1922.

The trial court found that while ultrasonic therapy is taught in one chiropractic college in California, it is not a part of the practice of chiropractic. [R. 45.] The trial court also found:

“A subject does not become a part of the practice of chiropractic merely because it is taught in a chiropractic college. Many subjects are taught in Chiropractic colleges which are not part of the practice of chiropractic.” [R. 45-46.]

Thus jurisprudence is also taught in the California colleges of chiropractic [See Appendix A, this brief, par. 4] but it can hardly be argued that the chiropractor may for that reason practice law.

We submit that the trial court did not err in finding that ultrasonic therapy is not a part of *chiropractic* as taught in chiropractic schools or colleges. As we will establish in the next part of this brief, ultrasonic therapy actually is a part of the practice of medicine.

⁹See Supplemental Stipulation as to Facts, pars. (1)-(3). This Supplemental Stipulation was designated for printing [R. 73, par. 8] but does not appear in the printed transcript of record. We have therefore printed it as Appendix A in this brief.

(3) Is Ultrasonic Therapy a Necessary Mechanical Measure Incident to the Care of the Body Which Does Not Constitute the Practice of Medicine?

Section 7 of the Chiropractic Act which defines the scope of a licensee's authority is divided into two parts by a semicolon. The second part states:

“and, also, to use all *necessary mechanical*, and hygienic and sanitary *measures incident to the care of the body*, but shall not authorize the practice of medicine”

In this connection, the trial court made two significant findings [R. 46]:

“Ultrasonic therapy is not a necessary mechanical measure incident to the care of the body in the practice of chiropractic.”

“Ultrasonic therapy is a part of the practice of medicine.”

Webster defines the term “incident” as “naturally happening or appertaining, esp. as a subordinate or subsidiary feature.” This seems to be the connotation adopted for the term by the California Courts.

In the case of *In re Hartman*, 10 Cal. App. 2d 213, 51 P. 2d 1104 (Dist. Ct. of Appeal, Fourth Dist., Calif., 1935), the defendant chiropractor contended that the use of hypodermic instruments to administer the Koch cancer treatment was authorized by Section 7. Rejecting this argument, the Court said at page 217:

“We think this cannot be held to be *merely* a measure incident to the care of the body within the meaning of that section, both because that clause of the section refers to general hygienic and sanitary measures, even though mechanical, *and not to the*

treatment of diseases and ailments, and because the section contains the further limitation that the authorisation granted shall not extend to the practice of medicine or surgery." [Emphasis added.]

In *People v. Nunn*, 65 Cal. App. 2d 188, 150 P. 2d 476 (Dist. Ct. of App., Second Dist., Div. 2, 1944), the Court said (at page 194) of a chiropractor licensed under Section 7:

"He may not invade the field of medicine or surgery or administer drugs or medicines included within *materia medica*. He is limited to the use of mechanical measures incident to the care of the body which do not invade the field of medicine and surgery. (*People v. Fowler*, 32 Cal. App. (2d) Supp. 737.)" [Emphasis added.]

In *People v. Fowler*, 32 Cal. App. 2d (Supp.) 737, 749-750, 84 P. 2d 326, 332-3 (Appellate Dept., Superior Ct., L. A. County, 1938), the Court carefully considered the "incidental measures" authorized by Section 7 and declared at page 750:

"But the other 'measures' mentioned in Section 7 are described in such general terms that they might well include many things which would be a part of medicine or surgery in the stricter sense . . . As to such measures, the proviso [against the practice of medicine] has an apparent office to perform; it prevents the chiropractor from resorting to them by authority of his license as such, or, as the trial court put it, he cannot 'invade the field of medicine and surgery.' [Nor] . . . does the statute confer any selective function upon chiropractic schools or colleges. They cannot, by teaching any measures which are properly a part of the practice of medicine . . . prevent them from being such, or authorize chiropractors to make use of them."

Clearly, only a *chiropractic* mechanical measure, such as a chiropractic table, would be permissible under Section 7. The Section does not authorize use of a mechanical measure if it is a part of the practice of medicine.

To argue that the ultrasonic devices in question are necessary *chiropractic* mechanical measures would be to overlook a fundamental tenet of chiropractic—namely, that chiropractic is a system for the practice of adjusting the joints, *especially at the spine*. Yet ultrasonic therapy is improper for use directly over the spinal column. [R. 26.]

More significant, however, is the fact that ultrasonic therapy is a part of the practice of medicine:

“Medical doctors, particularly those who specialize in physical medicine, employ ultrasonic therapy, where medically indicated, as part of their regular treatment of their patients.” [Supplemental Stip. As To Facts, Appendix A of this brief, paragraph (5).]

This stipulation is further corroborated in Claimant’s Exhibit A entitled “The Effect Of Single And Multiple Treatments Of New Zealand White Rabbits With A Schlessing Ultrasoniseur” which includes the following statement as its concluding paragraph on page 8:

“It is the opinion of the investigators that, if directions are followed, the use of the Schlessing Ultrasoniseur does not represent a dangerous therapeutic procedure and can safely be employed by qualified individuals *in the practice of physical medicine*.” [Emphasis added.]

Note also the medical journal articles cited in the Record, page 22, footnotes 2, 3, and 4.

The Court will recall that a physician's and surgeon's certificate authorizes the holder, among other things, "*to sever or penetrate the tissues of human beings.*" [Section 2137, Business and Professions Code.] This authority, being a part of the practice of medicine, is denied to the chiropractor.

In *People v. Fowler, supra*, 32 Cal. App. 2d (Supp.) 737, the Court stated on pages 749-750:

" . . . we conclude that the words 'medicine,' and 'surgery,' as used in section 7 of the Chiropractic Act, were intended to continue as to chiropractors the limitations imposed on drugless practitioners by the Medical Practice Act, that is, *to deny them the use of drugs and medical preparations and the severing or penetrating of the tissues of human beings.*" [Emphasis added.]

But the ultrasonic devices in question produce high frequency sound waves which *do penetrate* the body and may affect tissues located inches beneath the surface. [R. 18-19, par. (4).] In the use of these devices, "a moderate amount of energy is inducted into the tissue and bony structures"; there is "good beaming and good depth of penetration of sound waves"; "energy [is] absorbed to a greater extent in muscle than in fat"; and there is "selective heating at the tissue-bone interfaces." [R. 20-22.]

This type of penetration of the tissues is accomplished with sound waves rather than with surgical instruments, and it creates its own peculiar hazards.

“ . . . it is of the utmost importance that treatments be given by a doctor thoroughly familiar with the potentialities of the apparatus inasmuch as there is always the possibility of tissue damage from the reflective qualities of ultrasound by causing localized over-heating of bone and muscle when the energy rays are concentrated too long in one place.” [R. 21.]

Note also the contraindications, that is, the conditions where ultrasound therapy would be improper or undesirable. [R. 26.]

There would appear to be ample reason for a holding such as that in *O'Neill v. Board of Regents, etc.*, 74 N. Y. Supp. 2d 762 (Supreme Ct., Appellate Div., 1947), appeal dismissed 83 N.E. 2d 469 (1948), where the Court stated at page 763:

“Physiotherapy in its general sense is ‘the treatment of disease by physical remedies rather than drugs’ and *its practice is the practice of medicine* in that limited field.” [Emphasis added.]

See also *Joyner v. State*, 179 So. 573, 576 (Supreme Court, Miss., 1938), 115 A.L.R. 954, for a holding that the use of surgical instruments, electrical instruments, and “other appliances” in the treatment of disease is a part of the practice of medicine and surgery.

We submit that the trial court did not err in finding that “ultrasonic therapy is not a necessary mechanical measure incident to the care of the body in the practice of chiropractic” and that “ultrasonic therapy is a part of the practice of medicine.”

C. Unsuccessful Attempts to Amend the California Chiropractic Act Substantiate View That Authority of Licensed Chiropractor Is Narrowly Limited.

Since the enactment of the California Chiropractic Act in 1922 by initiative, there have been several direct attempts to enlarge the scope of a chiropractor's authority through amendment of the Act by initiative propositions. (Proposition 9 in 1934 and Proposition 2 in 1939.) Neither amendment was adopted. Both measures were supported by one group of chiropractors and opposed by another group of chiropractors, as appears in the arguments submitted to the voters.

Failure to adopt amendatory legislation does not provide a binding interpretation of the Act sought to be amended, though apparently it is a factor which may be considered by the Courts. See *Fahey v. O'Melveny & Myers, etc.*, 200 F. 2d 420, 479 (C.A. 9, 1952); *California Toll Bridge Authority v. Kuchel*, 40 Cal. 2d 43, 53-54, 251 P. 2d 4 (1952); 82 C.J.S. §360, pages 790-791.

The 1939 Initiative Proposal would have made fundamental revisions in the Chiropractic Act. Thus it would have changed Section 7 to read:

“One form of certificate shall be issued by the board of chiropractic examiners; said certificate shall be designated ‘License to practice chiropractic,’ which license shall authorize the holder thereof to diagnose and treat diseases, injuries, deformities or other physical or mental conditions of human beings, without the use of drugs and without in any manner severing any of the tissues of the human body.”

Under this proposal, the only limitation upon the licensed chiropractor would have been the use of drugs and surgery. It should be borne in mind that by this time (1939), the California Courts had judicially demarcated the narrow scope of Section 7. See cases cited earlier in this brief, especially *Fowler* (1938), *Quail* (1934), and *In re Hartman* (1935).

If this proposal is compared with Section 7 of the Chiropractic Act, the attempted enlargement of the licensee's authority is obvious. Instead of being licensed to practice "chiropractic" he would have been authorized "to diagnose and treat diseases, injuries, deformities, or other physical or mental conditions." Instead of being restricted to the use of measures "incident to the care of the body" with a proviso against "the practice of medicine, surgery, osteopathy, dentistry, or optometry," he would have been permitted to use any type of diagnostic or treating measure other than drugs and surgery.

The rather brief argument offered to the voters *in favor of* the 1939 Amendment said little about the enlarged scope of authority to practice. The following excerpts are taken from that argument:

"In 1922 the people of California voted to give Chiropractors a license to practice, and since that time no change has been made in this law. Times and conditions now make it necessary that the changes asked for in this amendment be added to the present law.

* * * * *

"PROHIBITS THE USE OF DRUGS OR SURGERY BY CHIROPRACTORS."

The argument *against* the proposed 1939 Amendment, like the one in favor of it, was submitted by a group of three chiropractors.¹⁰ We quote a few excerpts from that argument:

“The present California Chiropractic Act, adopted by the people in 1922, provides for the legal practice of chiropractic, in connection with which the chiropractor may use ‘*all necessary measures*’ *incident to the practice of chiropractic*. . . .

“*The proposed amendment would authorize chiropractors to practice medicine under chiropractic licensure*. The proposed increase in hours of study is in subjects not designed to increase the student’s knowledge of Chiropractic or his ability to practice it. . . .

“Today, the chiropractic field is divided into two groups. One group includes those chiropractors who have adequate education and training *in chiropractic*,

¹⁰The argument against this proposed amendment was submitted by:

T. F. Ratledge, D.C.,
Chairman Legislative Committee,
California Chiropractic Association.

L. A. McLellan, D.C.,
Secretary Chiropractic League of California.

Roy G. Labachotte, D.C.,
President of Palmer Standardized Chiropractors of California.

The argument in favor of this proposed amendment was submitted by:

Stanley M. Innes,
Past President, Affiliated Chiropractors of California.

George E. Swanson,
President, Affiliated Chiropractors of California,
Alameda-Contra Costa Unit.

W. F. Morris,
Member, State Board of Chiropractic Examiners.

and therefore, sincerely believe in its efficacy and completeness as a true science of health and who are *happy to leave medical practices to those who are fully educated, trained and authorized by law to practice medicine*. The other group includes a conglomerate of chiropractic licentiates whose chiropractic education is nondescript and inadequate, and who, therefore, never came to seriously believe in chiropractic principles nor in their own ability to apply them in practice. Also in this group are those whose only interest in possessing a chiropractic license is to use it as a shield behind which they hope to engage in illegal practices and escape the penalties for such violations of law.” [Emphasis added.]

These statements were made by *chiropractors* and are clearly in conformity with the views enunciated in the early 1920's by the Los Angeles College of Chiropractic and the Eclectic College of Chiropractic regarding the connotation of “chiropractic.”

We submit that these unsuccessful efforts to amend the Chiropractic Act substantiate our position that the practice of chiropractic is narrowly limited and that California chiropractors are not licensed by law to use the ultrasonic devices in question.

D. Miscellaneous Points.

(1) The Burden of Proof Is Upon Appellant.

Appellant seeks to establish that his proposed shipment of the devices in question to California chiropractors entitles those devices to an exemption from the affirmative requirement of 21 U.S.C. 352(f)(1) that their labeling

bear adequate directions for use. It is a settled rule of law that where a statute defines an offense and then creates an exception, he who seeks to show that he comes within the exception has the burden of proof. *People v. Fowler*, 32 Cal. App. 2d (Supp.) 737, 743 (1938); *Ocean Accident & Guaranty Corp. v. Rubin*, 73 F. 2d 157, 166 (C.A. 9, 1934), 96 A.L.R. 412; *McKelvey v. U. S.*, 260 U.S. 353, 357 (1922).

And such an exception is narrowly construed so as not to include any case which does not clearly fall within its provisions. *U. S. v. Dickson*, 15 Pet. 141, 165 (1841); *Canadian Pacific Ry. Co. v. U. S.*, 73 F. 2d 831, 834 (C.A. 9, 1934); *Shilkret v. Musicraft Records*, 131 F. 2d 929, 931 (C.A. 2, 1942), cert. den. 319 U.S. 742; *Ryan v. Carter*, 93 U.S. 78, 84 (1876).

(2) The Federal Food, Drug, and Cosmetic Act Is an Instrument of Public Protection.

The Federal Food, Drug, and Cosmetic Act is designed to protect the public health and pocketbook from adulterated and misbranded foods, drugs, devices, and cosmetics, and it is construed so as best to effectuate that objective. *U. S. v. El-O-Pathic Pharmacy*, 192 F. 2d 62, 75 (C.A. 9, 1951).

VII.

CONCLUSION.

Since Appellant did not establish that California chiropractors are licensed by law to use the ultrasonic devices in question, distribution to such persons would be in violation of the Federal Food, Drug, and Cosmetic Act.

We submit that the judgment of the District Court should therefore be affirmed.

Respectfully submitted,

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APPENDIX A.

Supplemental Stipulation As To Facts.¹

It is hereby stipulated by the parties to this proceeding, through their respective counsel, as follows:

(1) There are only four colleges of chiropractic in California. Of these four, three colleges do not teach ultrasonic therapy at all, and have never taught it.

(2) In the fourth college, the teaching of ultrasonic therapy was introduced in 1946. This was the first time that ultrasonic therapy was included in the curriculum of any California college of chiropractic. Ultrasonic therapy is now taught as part of 3 different undergraduate courses in that college. The amount of time devoted to ultrasonic therapy in each of these courses varies from a part of a class period to several such periods, as deemed necessary by the class instructor.

(3) Said fourth college of chiropractic has also given some graduate training in ultrasonic therapy. In 1952, ultrasonic therapy was the subject of a seminar in the graduate school comprising a 3 to 12-hour course. In addition, a 2-hour post graduate course in ultrasonic therapy was given there in 1953 and a 3-hour post graduate course in such therapy was given there in 1954.

(4) The curriculum at the various California colleges of chiropractic includes courses in physiotherapy, psychiatry, jurisprudence, and obstetrics.

¹This document was designated for printing as part of the printed Transcript of Record. [R. 73, par. 8.] Apparently through an inadvertence, however, it was not printed in that Transcript. We are therefore printing it in full in this Appendix, except for the title of the District Court and of the Cause.

(5) Medical doctors, particularly those who specialize in physical medicine, employ ultrasonic therapy, where medically indicated, as part of their regular treatment of their patients.

(6) Under competent supervision, ultrasonic therapy may be employed safely as adjuvant therapy in the treatment of osteoarthritis and bursitis.

This "Supplemental Stipulation As To Facts" is submitted by the parties in lieu of any affidavits.

Dated: October 1, 1954.

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United States Attorney,

/s/ MAX F. DEUTZ,

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/s/ Spencer E. Van Dyke,

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Filed October 4, 1954.

No. 14802.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

The Rulings of the Superior Court Appellate Department of Los Angeles County Relied Upon by Appellee Are Not Depositive of This Appeal nor Binding Upon This Court.

Appellee asserts that the questions on this appeal are governed by the cases of *People v. Fowler*, 32 Cal. App. 2d (Supp.) 737, 84 P. 2d 326 (1938); *People v. Maniagli*, 97 Cal. App. 2d (Supp.) 935, 218 P. 2d 1025. Both of these decisions arise from the criminal prosecution of misdemeanors in the Municipal Court of Los Angeles and decided by the Appellate Department of the Superior Court. These cases neither represent a goodly number of trial courts of the state generally and for a

considerable period of time which have adhered to a common interpretation of this point nor have they been recognized by the Appellate Courts for the propositions upon which they are relied by Appellee. The California Appellate Courts since the passage of the Chiropractic Act in 1922 have laid down the rule that the determination of the scope of chiropractic under the Chiropractic Act must be determined by resorting to extrinsic evidence as to what was taught in schools and colleges. (*Evans v. McGranaghan*, 4 Cal. App. 2d 202, 41 P. 2d 937 (1935); *In re Hartman*, 10 Cal. App. 2d 213, 51 P. 2d 1104 (1935).) The case of *People v. Nunn*, 55 Cal. App. 2d 188, 194, 150 P. 2d 476, merely cites the *Fowler* case to the effect that a chiropractor cannot legally practice surgery and that his practice is limited to the arts taught in the school of chiropractor. The *Fowler* case was a municipal court prosecution of the medical practice act, the defense was that the defendant was licensed under the Chiropractic Act of 1922 and it was therefore necessary for the defendant to prove that his actions were within the scope of his license. The offense committed by the defendant appears to be an act involving surgery, although this is not set forth in the opinion, the court states however at page 749:

“ . . . and noting that the advocates of the chiropractic act stated in the arguments to voters above mentioned no objection to the scope of the license which a chiropractor could obtain under the Medical Practice Act, but on the contrary declared that under the proposed act chiropractors could not use drugs or surgery, we conclude that the words ‘medicine’, and ‘surgery’, as used in Section 7 of the Chiropractic Act, were intended to continue as to chiropractors the limitations imposed on drugless

practitioners by the Medical Practice Act, that is, to deny them the use of drugs and medical preparations and the severing or penetration of the tissues of human beings.”

This being the fact the defendant was not able to substantiate by extrinsic evidence that surgery was within the scope of the chiropractic license. The same situation existed in *People v. Mangiagli*, 97 Cal. App. 2d (Supp.) 935, 218 P. 2d 1025, wherein the defendant was unable to show by extrinsic evidence that the packing of a patient's uterus with gauze, inserting a needle in a vein of her arm and injecting blood plasma, giving of parathyroid tablets and a hypodermic injection of liver extract were acts within the scope of the chiropractic license. It was therefore not necessary for the court to determine by extrinsic evidence what was taught in schools and colleges in order to determine the scope of the chiropractic act. The defendants actions in both cases were purely the practice of medicine. This fact was obvious and no amount of evidence could alter it.

Neither of these cases, relied upon so heavily by the appellee were cited or referred to in the case of *Oosterveen v. Board of Medical Examiners*, 112 Cal. 2d 201, 246 P. 2d 136, nor was the *Fowler* case cited in the case of *Hunt v. Board of Chiropractic Examiners*, 87 Cal. App. 2d 98, 196 P. 2d 77. Appellee contends that this court should be bound by the rulings contained in the *Fowler* and *Mangiagli* cases by virtue of a quoted portion from the case of *State of California, Department of Employment v. Fred S. Reynauld & Co., Inc.*, 179 F. 2d 605 (C. A. 9, 1950). The following is quoted from page 18 of Appellee's brief; “(c) a goodly number of the trial

courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point.” The interpretation of the scope of chiropractic contained in the *Fowler* and *Mangiagli* cases cannot be considered as a goodly number of trial court decisions of the state generally they being two in number and from the same court. The state courts have not for a considerable period of time adhered to these interpretations which, in fact, are contrary to the interpretation of the District Court of Appeal of the State of California in the case of *Hunt v. Board of Chiropractic Examiners* and the California Supreme Court in the case of *Oosterveen v. Board of Medical Examiners, supra*. Not only have the courts not adhered to such a common point of interpretation but the California legislature has indicated that the scope of chiropractic under the act encompasses more than the mere adjustment of the spine by hand. Examples of the legislative attitude can be found in the Business and Professions Code, Section 6522, relating to Barbers. This section provides as follows:

“Sec. 6522. *Practices and persons excluded from Act.* The provisions of this chapter do not apply to:

“(a) Persons authorized by the law of this State to practice medicine and surgery or osteopathy or chiropractic or persons holding a drugless practitioner certificate under the laws of this State.”

Section 7324 of the Business and Professions Code relating to Cosmetology provides as follows:

“Sec. 7324. *Persons and practices Exempted.* The following persons are exempt from this chapter:

“(a) All persons authorized by the laws of this State to practice medicine, surgery, dentistry, pharmacy (including those employed in pharmacies), osteopathy, chiropractic, naturopathy or chiropody.”

Section 4052 of the Business and Professions Code relates to the sale of packaged, bottled or non bulk trade marked chemicals, drugs or medicines, the sale of certain listed drugs and the sale of certain medical supplies etc., under certain conditions. This section states as follows:

"Sec. 4052. Application of chapter and section: Sale of packaged, bottled or nonbulk trade-marked chemicals, drugs, or medicines: Sale of certain listed drugs: Sale of certain medical supplies, etc., under certain conditions: Application of Sec. 4030.

"

"(b) [Sale of certain medical supplies, etc., under certain conditions not exempt from chapter.] This chapter does not apply to the sale of any intravenous solution of 150 cubic centimeters or over; cold sterilizing solutions, sterilized sutures; hypodermic needles and syringes; sterile distilled water U. S. P.; sterile normal saline solution; laboratory chemicals and reagents, stains and dyes; chemicals and drugs used as indicators in diagnostic and X-ray examinations, soaps, detergents and tincture of green soap U. S. P.; medicinal gases, ether, chloroform and ethyl chloride; sulfa creams, ointments, and jellies used for introduction into the vaginal tract; and medicated dressings; where such sale is made to any of the following:

"1. A physician, dentist, chiropodist, veterinarian, pharmacist, medical technician or medical technologist holding a currently valid and unrevoked license to practice his profession; and a chiropractor acting within the scope of his license."

These quoted sections from the California Business and Professions Code strongly indicate that the California legislature regards chiropractic as a profession and that chiropractors licensed in this state are not limited under such license to mere adjustment of the spine by hand.

Physiotherapy Is Included in the Scope of Chiropractic Under the California Act.

Appellee asserts in its brief commencing on page 29 that physiotherapy is not a part of chiropractic. Appellee states that the case of *Oosterveen v. Board of Medical Examiners* is not helpful to Appellant's position because of a statement in the decision to the effect that it did not adopt the trial courts definition of naturopathy in all respects. The *Oosterveen* case cannot be disposed of so easily nor can the effect of the courts decision in that case be summarily dismissed when the question is presented as to the scope of the chiropractic license under the California Chiropractic Act. There can be no argument with the holding in that case that the methods of naturopaths may be employed by licensed chiropractors. Such a holding by the Supreme Court of the State of California is at variance with the restrictive definition of chiropractic adopted by the District Court in this case. The *Oosterveen* case has been recognized by the Senate Interim Committee on Licensing Business and Professions as a valid reason for refusing to again license Naturopaths in this state because a chiropractor can properly perform almost every function contained in the general definition of naturopathy. The interpretation placed upon the scope of chiropractic by the District Court and the Appellee to the effect that the term chiropractic is limited to adjustment of the spine by hand would not only leave the practice of Chiropractic in a static position contrary to the decision of the court in *Hunt v. Board of Chiropractic Examiners* (*supra*), but would obviously be a strained interpretation. Appellee in his brief at page 31 makes the following statement.

“Adjustment by hand for the treatment of disease is one form of physical therapy, but the licensed chiropractor need not comply with the new physical therapy statutes in order to continue giving manual adjustments.”

Such an interpretation is unreasonable. The effect of such thinking is tantamount to saying that physiotherapists may practice chiropractic as one form of physiotherapy but a chiropractor may not practice physiotherapy, it being a special field. The scope of physical therapy is defined in Sections 2601 and 2660 of the California Business and Professions Code as follows:

“2601. ‘Physical therapy’ means the treatment of any bodily or mental condition of any person by the use of the physical, chemical, and other properties of heat, light, water or electricity, and by massage and active or passive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization are not authorized under the term ‘physical therapy’ as used herein.

“2660. The term ‘physical therapy’ shall mean the treatment of any bodily or mental condition of any person by the use of the physical, chemical and other properties of heat, light, water, electricity, massage, and active passive, and resistive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term ‘physical therapy’ as used herein, and a license issued hereunder shall not authorize the diagnosis of disease.

“2665. One year from the effective date of this act, no person not licensed under this chapter shall practice physical therapy in this State for compensa-

tion received or expected; provided, however, that this prohibition shall not apply to any of the following:

“(a) Any activities authorized by their licenses on the part of any persons licensed under this code *or any initiative act.* * * *.”

Appellants Opening Brief sets forth on page 40 that the only initiative measures relating to the practice of the healing arts in this state are the measures dealing with osteopathy and chiropractic and since the Chiropractic Act alone sets up an independent type of practice it is undoubtedly the Act to which the legislature made reference in the Physical Therapy Act. The prohibition against practicing physiotherapy by the wording of the act does not therefore apply to licensed chiropractors. The statute recognizes the continued use by chiropractors of physical therapy methods in the same manner as chiropractors in this state have used such methods since long before the passage of the Chiropractic Act of 1922.

The California Chiropractic Act Recognized an Existing Profession and Provided Authority to Practice Such Profession in the Same Manner as Such Profession Had Been Taught and Practiced.

Section 7 of the Chiropractic Act of 1922 authorized licensees to engage in the chiropractic profession not merely to make spinal adjustments. If only spinal adjustments had been intended then the act would have said so. Appellee refers on pages 23 and 24 of its brief to the Iowa Statute which was the subject of interpretation in the case of *State v. Boston*, 278 N. W. 291, 284 N. W. 143. The Iowa Statute defines chiropractic as: “Persons who treat human ailments by the adjustments by hand of the articu-

lations of the spine or by other incidental adjustments.” If the California statute was as specific in its scope as the Iowa Statute above quoted then there would be no reason for any further interpretation by this court. Such specific prohibitions regarding the practice of Chiropractic in the state of California were not placed in the California Act. Appellee asserts that the scope of chiropractic under the act is restricted to the one subject of “chiropractic” taught in such schools and colleges and further restricted to the same manner as this particular one subject was taught in 1922. Appellee is reading into Section 7 of the Chiropractic Act something that is not there and never was intended to be placed there. Section 7 specifically defines the scope of chiropractic as: “. . . taught in Chiropractic schools and colleges.” It does not define chiropractic to only the subject of chiropractic as taught in schools and colleges. If such had been intended it is submitted that the Act would have been so worded to accomplish this. This is further borne out by the decisions of *Evans v. McGranaghan*, 4 Cal. App. 2d 202, 41 P. 2d 937, and *In re Hartman*, 10 Cal. App. 2d 213, 51 P. 2d 1104. The court in these cases decided that the scope of chiropractic as taught in schools and colleges could not be decided in the absence of evidence on that subject and that a resort to such evidence would be proper. We should accept the fact that the court in these cases undertood that the particular subject of chiropractic theory and practice was certainly taught in chiropractic schools and colleges. When the court indicated that it could not decide the scope of chiropractic in the absence of extrinsic evidence as to what was taught in schools and colleges it was referring to what else was taught in such schools and colleges. The court wanted evidence of the

curriculum in order to determine the scope of chiropractic under the act. The specific subject of chiropractic theory and practice, as set forth in Appellants Opening Brief, amounted to a small part of the curriculum.

Appellee contends that the definition of chiropractic was well known in 1922 and that the California Act was intended to comply with such definitions regardless of how it is worded. Appellee has overlooked the fact that the California Chiropractic Act was really intended to cover the practice of Chiropractic in this state as it was being taught and practiced. If this were not true then there would be no reason whatsoever for the provision of the Act which appears in Section 16 as follows: "Nor shall this Act be construed so as to discriminate against any particular school of chiropractic, or any other treatment" Recognition of the varied practice and teaching of chiropractic was made in providing in Section 7 of the Chiropractic Act that but one form of certificate would be issued by the Board of Chiropractic Examiners which was designated "license to practice chiropractic." This language was used to show that there would be but one certificate for all schools of chiropractic as distinguished from separate certificates for each of the methods taught by various schools or colleges. Further evidence that the act was intended exactly the way it is worded is found in the provisions of Section 6(c) of the Act which provides in effect, for written examinations in all of the subjects set forth in Section 5 to ascertain *fitness of an applicant to practice chiropractic*. (Emphasis added.) The intent of the Act was to include within the scope of the Chiropractic practice all of the matters set forth in Section 5 relating to the minimum educational

requirements. It is unreasonable to presume that the same Act that provided that chiropractic licentiates should have authority to give emergency treatment, sign death certificates and be required to comply with all regulations pertaining to public health, should be restricted to the adjustment of the vertebrae by hand. Chiropractors in this state, with the possible exception of the strict Palmer practitioners, have always engaged in physiotherapy treatments. In fact they have been the leading pioneers in this field. Appellee by its assertions has further failed to recognize that prior to the passage of the Chiropractic Act the chiropractors of California were licensed under the Drugless Practitioners Act; that those licensed under this Act used physical therapy methods extensively. The minimum educational requirements under the Drugless Practitioners Act is set forth in Appellant's Opening Brief on pages 22 and 23. The Act provides for 500 hours of manipulative and mechanical therapy. It contained no specific required subject for "chiropractic theory and practice" which appellee relies upon to limit the scope of the chiropractic license.

Unsuccessful Attempts to Amend the Chiropractic Act Does Not Change the Meaning of the Chiropractic Act.

Appellee directs attention to an attempt to amend the Chiropractic Act in the years 1934 and 1939. It is contended that in some way the failure to adopt such legislation is a factor to be considered by the court. It is natural that an attempt be made to amend the Chiropractic Act as the result of court decisions which have been discussed in this appeal. It is not surprising that certain chiropractors participated in the argument against the

enlargement of the chiropractor's authority. Appellant's opening brief dealt at some length on the difference in chiropractic philosophy which had developed between the advocates of the Palmer theory and technique and the broader theory and technique advocated by the group that became licensed under the Drugless Practitioners Act. In 1948 the Chiropractic Act of 1922 was amended. This amendment authorized the State Board of Chiropractic Examiners to approve or disapprove schools, prescribe requirements therefor, determine minimum requirements for chiropractic teachers and among other things to increase educational requirement from 2400 hours to 4,000 hours. This advancement for the chiropractic profession was bitterly resisted by certain chiropractors. The following is an excerpt from the argument made against the proposition by chiropractors:

“This act proposes to change Chiropractic subjects to those of medicine—to wit: Analysis, the basis of Chiropractic has been completely eliminated. The study of anatomy has been reduced from 25 per cent to a possible 18 per cent of the course and the Principles and Practice of Chiropractic may be completely eliminated for office procedure and some physiotherapy. Any part of 17 per cent of four thousand hours or 680 elective study hours could be used to teach medicine, surgery and/or obstetrics. There is no provision to prevent the 5000 chiropractors, now licensed (without training in such subjects) from practicing in these fields.”

It is not contended by the Appellant that the above argument should be a factor to be considered by the court to permit the practice of medicine. It should however, be equally as persuasive that chiropractic is not restricted

to the mere adjustment of the spine by hand or that attempts to amend the Chiropractic Act is a factor in appellee's favor.

The Use of Ultrasonic Therapy Is an Advanced Physical Therapy Method and Does Not Constitute the Practice of Medicine.

It is true, as Appellee asserts, that medical doctors employ ultrasonic therapy. The device is used by medical doctors in a much different manner. The physician normally uses an output of energy from 3 to 6 watts per square centimeter of the transducer head. The device used by chiropractors is calibrated to put out one-half of a watt per square centimeter of the transducer head. The device used by physicians is used in the treatment of ailments much different than giving physiotherapy treatment. The fact however, that the device is used by physicians or by designating the device as one used in "physical medicine," as appellee asserts, does not exclude the Chiropractors from using such device. Such action on the part of physicians does not make the use of such devices the practice of medicine and detract from the authority of the chiropractic license accordingly. Appellee asserts that since the device produces high frequency sound waves which do penetrate the body that it must be the practice of medicine and not chiropractic. Appellee contends in support of this contention that the physician's and surgeon's certificate authorizes the holder among other things, "to sever or penetrate the tissues of human beings." It should be noted that the ultrasonic device does not sever the tissues of human beings and that the wording of the authorization quoted above for physicians and surgeons states ". . . to sever or penetrate." "Sever or pene-

trate” are used in the alternative and means the same thing. The action of the ultrasonic device and the treatment given thereby have no relation to the penetration described in the authorization given to physicians and surgeons. The devices under labeling approved by the Food and Drug Administration in this case are not the devices used by physicians in the practice of physical medicine. Even the devices used by physicians cannot be classed as devices for “penetration” as described in the authority of the physician and which is synonymous with the term “severing” as used therein.

The Decision of the District Court Is in Conflict With That Part of Section 7, the Chiropractic Act, Which Authorized Chiropractors “to Use All Necessary Mechanical and Hygienic and Sanitary Measures Incident to the Care of the Body.”

There is no conflict in this case that the above quoted portion of Section 7 of the Chiropractic Act is not a definition of, but an addition to, chiropractic as used in the previous part of Section 7 and authorizes chiropractors to use measures which would not otherwise be within the scope of their licenses. Appellee contends that this authority is restricted to the use of mechanical tables or such devices that directly assist in the giving of spinal adjustment. Under the wording of the Chiropractic Act this view is so grossly restrictive as to be unreasonable. There is no question but what the drugless practitioners of 1922 could and did practice physiotherapy. The Chiropractic Act as stated on the California ballot in 1922 amended certain provisions of the Medical Practice Act. Conflicting portions of the Medical Practice Act under which chiropractors were licensed were set forth under the

ballot heading of "existing provisions" and a subheading of "provisions differing from proposed chiropractic act." This is set forth in Appellant's Exhibit B in the affidavit of Dr. Lee H. Norcross, D.C. The actual changes were in the division of the educational hours and the addition of 400 hours education together with the addition of the subject of "Chiropractic Theory and Practice." In the argument against the adoption of the act it was stated that the only purpose was to triplicate the work being done effectively and economically by one responsible Board of Examiners. Further, that many chiropractors had taken and passed the examination and were legally licensed under the Drugless Practitioners Act and legally practicing. The addition at that time of a new course called "Chiropractic Theory and Practice" is now being used by Appellee in support of its position that Section 7 limits the scope of chiropractic to include only that which was taught in schools and colleges under this particular one subject. As previously set forth the Drugless Practitioners Act and other Acts of California under which the chiropractor was licensed prior to the passage of the Chiropractic Act were necessary guides to fashion the new act and to include in the new act the methods and practices being taught and actually used prior to that time. It is submitted that Appellee's assertion is erroneous to the effect that the Chiropractic Act of 1922 was a new and independent movement which had as the basis of its scope the dictionary definitions of chiropractic which Appellee contends governs the wording of the Chiropractic Act.

Conclusion.

Section 7 of the Chiropractic Act adequately provides that Chiropractors shall not practice medicine, surgery, osteopathy, dentistry or optometry, nor use any drug or medicine now or hereafter included *in materia medica*. The Chiropractic Act considered as a whole contemplates the practice of a profession up to the point of these prohibitions. The Chiropractic Act provides for a scope of practice which includes drugless adjunct therapy of which physiotherapy and physiotherapy devices is included. It is respectfully submitted that Appellant's Motion to Compel Administrative Approval of Appellant's Proposed Method of Distributing Devices under Seizure be granted.

Respectfully submitted,

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